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NO.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CENTRAL GULF LINES, INC., ET AL.
Petitioner,

versus

UNITED STATES OF AMERICA
Respondent

Petition for Writ of Certiorari To The
United States Court of Appeals For The Fifth Circuit

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155 pp

QUESTIONS PRESENTED FOR REVIEW

1) Under this Court's holding in Beech Aircraft v. Rainey, is it improper to admit into evidence untrustworthy hearsay survey reports prepared in a Third World country without the testimony of the surveyor or proper authentication and to rely on said reports to establish prima facie proof of damage claims under the Carriage of Goods by Sea Act?

2) Is a carrier entitled to the "Q" clause defense under the Carriage of Goods by Sea Act when the carrier establishes seaworthy vessels and delivery of vessels and cargo in good condition to a Communist Government as required by custom of port and damage or loss of cargo results from monsoon rain, thieves and congested port after delivery to receiver?

3) Does the clearly erroneous rule require affirmance on appeal when, if improper hearsay is eliminated from record, there is a total lack of supporting evidence for claims?

4) Can a trial court's denial of Government's post-judgment motion for re-opening of evidence be reversed by Appellate Court without finding abuse of discretion below?

LIST OF INTERESTED PARTIES PURSUANT TO RULE 29.1

1) Central Gulf Lines, Inc.

2) International Shipholding Corporation (Parent).

3) Assuranceforeningen GARD.

4) United States of America including the Commodity Credit Corporation.

5) Jones, Walker, Waechter, Poitevent, Carrere & Denegre.

6) The United States Justice Department.

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CITATIONS TO OPINIONS BELOW

The District Court opinion is not reported officially but is contained in Appendix C and the Opinion of the Circuit Court of Appeals for the Fifth Circuit is reported at 974 F.2d 621 (1992) and appears in Appendix A.

JURISDICTION

This case involves a Third World Communist country's mishandling of extensive famine relief food supplies which resulted in allegations of cargo loss and damage to cargo carried under bills of lading governed by the Carriage of Goods by Sea Act, 46 U.S.C. §§1300-1315, on U.S. flag vessels within the Admiralty and Maritime Jurisdiction of the federal courts, 28 U.S.C. §1333.

Central Gulf Lines, Inc. appealed from the Judgment in favor of Respondent entered on August 2[illegible]991, by the district court pursuant to 28 U.S.C. §1291 and now invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c) to request certiorari to review the Judgment of the Court of Appeals for the Fifth Circuit that was entered on October 9, 1992.

STATUTES, RULES AND REGULATIONS INVOLVED

28 U.S.C. §1251; 28 U.S.C. §1333; 46 U.S.C. §1300-1304; 22 C.F.R. §211.9(c)(1)(i); Fed. R. Civ. P. 32A; Fed. R. Civ. P. 52(a); Fed. R. Evid. 201, 801(d)(2)(D), 801, 802, 803(8)(C), 901, 902(3) (Copied in Appendix G).

STATEMENT OF THE CASE

In 1985 - 1986, facing the same problems as the United Nations is confronting in Somalia, Petitioner, Central Gulf Lines, Inc., an American flag ocean carrier was transporting famine relief food to the people in Communist Ethiopia. To avoid certain death by starvation, the world overwhelmed the Ethiopian ports with food. Unfortunately, much of the food was lost after delivery by the carriers as a direct result of the actions of monsoon rains, thieves, and Ethiopian Governmental inefficiency. Any loss sustained by the cargo was caused by the Ethiopian Government's inefficiency, incompetence and indifference, coupled with their port rules, civil war and their inability to move the cargo away from delivery ports. The country lacked the means to handle cargo and also lacked competent surveyors. The surveys issued did not contain the normal rudiments of surveys, i.e., damage to cargo, what, when, where and how caused, and in many instances they indicated a second survey would be issued but it never was issued. Suit was filed in United States District Court for the Eastern District of Louisiana under the Carriage of Goods by Sea Act and 28 U.S.C. §1333. Appeal from the District Court's Judgment dated August 27, 1991 to Court of Appeals for Fifth Circuit was under 28 U.S.C. §1291. The trial court erred and the Appellate Court compounded the error in holding a lack of abuse of discretion in the admission of surveys totally lacking trustworthiness and holding that the surveys supported the loss claimed, and that carrier was not entitled to defenses under Carriage of Goods by Sea Act. The Appellate Court erred in reversing District Court ruling on the U. S.'s Motion to Re-open Evidence without finding an abuse of discretion below and in not following the circuit's own case law.

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on October 9, 1992, which

Judgment affirmed District Court's Judgment dated August 27, 1991. Petitioner seeks certiorari in accordance with Rule 10 of this Court which provides for review of an Appellate Court Opinion which "has so far departed from the accepted and usual course of judicial proceedings" or has affirmed such a departure by a lower court.

ARGUMENT

BEECH AIRCRAFT V. RAINEY REQUIRES EXCLUSION OF UNTRUSTWORTHY HEARSAY REPORTS WITH RESULT THAT RESPONDENT FAILS TO PROVE ITS CLAIMS.

In McAllister v. United States, 348 U.S. 19 (1954), this Court stated as follows:

> In reviewing the judgment of a trial Court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous ... A finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed"...

The court below, in its opinion, relied on a misinterpretation of the clearly erroneous rule of judicial review in affirming the specific findings of the trial court, even though the findings lacked a proper evidentiary basis.

Here liability was imposed on the carrier solely on the basis of inadmissible hearsay reports. In Emmco Ins. Co. v. Wallenius Caribbean Line, S.A., 492 F.2d 508, 510 (5th Cir.

1974), the Fifth Circuit ruled that the improper admission of hearsay evidence resulted in a clearly erroneous decision by the trial judge and thus was reversible error:

> Appellant maintains that if the hearsay statements, improperly admitted, are subtracted from the evidence at trial, the district court's decision is "clearly erroneous." Fed.R.Civ. P. 52(a). An examination of the properly admissible evidence reveals that the court's findings "are without adequate evidentiary support in the record" and leaves us with a "definite and firm conviction" that the district court was mistaken. Chaney v. City of Galveston, 368 F.2d 774, 776 (5th Cir. 1966).

TRIAL JUDGE ABUSED HIS DISCRETION IN ADMITTING IN EVIDENCE RANK HEARSAY CONSISTING OF SURVEY REPORTS AND QUARANTINE CERTIFICATES WHICH FAILED TO MEET ANY EXCEPTIONS UNDER RULES OF EVIDENCE.

The survey reports were hearsay as defined and prohibited by Fed.R.Evid. 801 and 802, and fail to qualify for admission pursuant to any exception.

REPORTS LACK PERSONAL KNOWLEDGE.

The survey reports were tendered through the testimony of Catherine McCullough, a CCC office claims adjuster, and Goyton Aregai, a general manager in the Addis Ababa office of

Gellatly, Hankey & Co. (Gellatly), the principal Ethiopian survey firm which issued a majority of the disputed survey reports. Absent throughout the trial or by deposition were any of the actual surveyors, checkers or anyone from the survey firms who had observed the condition of the cargo or the manner in which the surveys were performed.

McCullough admitted that she had no knowledge of whether anyone EVER ATTENDED THE DISCHARGE OF CARGO OR WHAT TYPE OF SURVEY OR EXAMINATION OF THE CARGO, IF ANY, WAS CONDUCTED. Tr.I at 117. Aregai testified: "I AM NOT A SURVEYOR." Tr.II at 57. Aregai did not author any of the survey reports offered by the Respondent, but only testified generally about his firm's survey operations in Assab and Massawa, Ethiopia. He lacked knowledge of the content of any of the surveys. For the Court's convenience an extract of testimony is included in Appendix M.

Aregai admitted that Gellatly had only three cargo surveyors in Assab who worked eight-hour shifts around the clock twenty-four hours a day. Tr.II at 60. Thus, in a twenty-four hour period, the discharge of only one ship or barge could be attended. Yet, at critical times as many as six ships were discharging simultaneously. Tr.II at 63. This volume forced Gellatly to hire ten additional persons in Assab. These ten were not qualified surveyors but were merely "checkers." Tr.II at 62. The person who prepared or signed the survey report was not necessarily the same person who had a first-hand knowledge of the cargo's condition. Tr.II at 69.

Indeed Mitchell testified by deposition that, lacking personnel, Gellatly surveyors never personally attended cargo surveys in Assab but would only attend hull damage surveys of the barges. Depo. of Mitchell, Vol.II at 175-76.

Accordingly, the surveys relied upon by the trial judge demonstrate a total lack of personal knowledge. Language such as "the cargo was said to be" and the minimal information contained in the surveys reflects information that was probably obtained from second-hand sources. Depo. of Mr. Athanassopoulos at pp 73-74.

The evidence conclusively establishes that the survey reports fail to indicate that surveyors personally attended the discharge of cargo from the LASH barges. The trial judge committed clear error in finding that the surveys are based on personal knowledge and abused his discretion in admitting the survey reports into evidence and the Fifth Circuit should have reversed this holding.

REPORTS LACK TRUSTWORTHINESS.

Trustworthiness of hearsay documents can only be determined by examination of all relevant circumstances, including: 1) The timeliness of the investigations; (2) the investigators' skill or experience; (3) whether a hearing was held; and (4) possible bias in reports prepared with the view to possible litigation. Advisory Committee Notes to Fed.R.Evid. 803(8)(C). Beech Aircraft Corp. v. Rainey, 109 S.Ct. 429 (1988), and Reliance Insurance Company v. Glados, 109 S.Ct. 775 (1989), hold that in considering what constitutes a hearsay exempt public record, the trial court is duty-bound to consider whether the sources of information or other circumstances indicate a lack of trustworthiness. The trustworthiness inquiry was placed in the Federal Rules of Evidence by Congress to guard against the admission of unreliable reports.

In view of the above, since no examination was conducted of the cargo, the surveys were not based on any investigation, let alone one that was timely conducted.

Skill or experience of the surveyors is the second factor. Here evidence of the lack of expertise or skill of the surveyors or preparers of the reports consists of the testimony of Aregai and Livermore, infra, and the self-evident sub-standard surveys themselves. Gellatly personnel were described by Aregai at Tr.II at 62:

Discussing the ten hirees at Assab he stated:

A. Yeah, well, you see, we have a qualified surveyor of our own which I call the three people. We really call them surveyor, but we call them really checkers where we appoint them in different places...

Q. Your surveyors, your three, would not be attending constantly at any given ship or barge?

A. Well, they attend themselves.

Q. Constantly, they are there the whole time?

A. Not constant, no. Id. at 62-63.

The surveyor's lack of expertise and attendance is evident by reading the surveys. The surveys fail to properly record the cause, nature and extent of damage, as well as the quantity of cargo discharged. The surveys give no indication that the barge itself was examined and no report of physical findings regarding the barge which could have caused the alleged damage to the cargo, no identification of the stowage, quantity and packaging of cargo inside the barge, the method of discharge, the quantity of cargo discharged from a barge, and the condition of the cargo upon discharge. As to wetting or stained bags, there is

no indication that the food contents in any bag was found to be wet.

Most important, not one survey reflected any cargo damage caused by the Ethopian government stevedores... an absolute impossibility. Something beyond belief!!

Frank Livermore, a professional cargo surveyor, testified and was the only cargo expert witness. Tr.III at 37-51. Livermore confirmed that adequate information must be included in a survey report to inform of the condition of the cargo at discharge. Id. at 39. Livermore read all of the surveys offered by the CCC and expressed his opinion that they were clearly INADEQUATE, UNCONVINCING AND UNRELIABLE FOR LACK OF INFORMATION THAT SHOULD BE FOUND IN A CARGO SURVEY!!! Id. at 40-41. In several claims, the district court relied on these obscure notations as the sole basis for concluding that the cargo was damaged and a total loss.

The lack of expertise prejudiced what little factual findings were made. Many surveys use the word "wet" or "stained bag". A common phenomenon, known as "sweating," occurs when water condensation accumulates inside a closed barge. "Sweating" can cause the outer layer of the paper packaging to appear stained or wet. When the barge is opened for discharge, the paper bags are sometimes stained from the sweating, rain or sea water. The commodity inside the bag is not necessarily damaged. Just because the packaging was suspect does not mean the cargo is damaged. Livermore testified that if bags appear to be stained or wet that the bags should be opened and the contents of the bag examined.

Q. Does a wet bag on the outside necessarily mean the contents have been damaged?

A. No.

Q. Does the bag stain indicate that the contents would be damaged?

A. No. Id. at 43-44; Accord p-495.

The trial judge noted his understanding of the relevance of the omissions in the subject survey reports by stating:

> The court ... I have an idea that something can be stained without being wet.
>
> ***
>
> I am aware that something can be stained. I mean, you don't have to be a surveyor to know that. You can stain it if you spray something on it and not affect the contents at all. Tr.III at 50.

In his opinion, the trial judge erroneously stated that the "surveyors knew how to distinguish between stained bags with good cargo on the one hand and stained bags with bad cargo on the other hand," by relying on Exh. P-495. Actually that survey by Capt. Tilahun (Exh. P-495) is the only example of an adequate survey offered by the CCC. Tilahun reported that he conducted an actual physical examination of the contents of bags which were described as wet and stained. This lone survey does not establish that the other surveys were based on an actual examination of the contents of bags described as wet or stained. Each survey must be examined on its own merit. The trial judge's failure to examine and rule on the admissibility of each survey constitutes reversible error. His finding that one survey, Exh. P-495, was trustworthy does not provide a basis for admitting every other survey. The trial judge's findings are reversible as clearly

erroneous and the admission of the survey reports, except for Exh. P-495, was an abuse of discretion.

The trial judge attempted to justify the inadequacy and obvious untrutworthiness in the survey reports by noting that they originated in a Third World country, which cannot be expected to produce surveys which are typically found "in more competitive thriving ports and countries." Appendix at C-11. This finding is clearly erroneous, as is evident from survey report Exh. P-495.

The trial court further erred in finding that "Central Gulf never complained at the time about the method or accuracy that any surveyor was conducting his survey," and cited Aregai's testimony at Tr.II at 58-59. Appendix at C-11. However, on cross-examination it was established that Gellatly did not furnish Central Gulf, and more particularly its representative, Captain Nazareth, with any cargo surveys, but only furnished him with the barge hull damage surveys which were prepared for Central Gulf's hull insurer through Alexander & Alexander. Id. at 65.

The third criteria is whether a hearing was held which supports the facts and conclusions reported. There was no "hearing" conducted. The CCC's own regulations at 22 C.F.R.§211.9(c)(1)(i) require a joint survey. There was none. The trial judge held that a joint survey was required only "if practicable." However, the trial judge did not find that it was not practicable to put the carrier on notice and request a joint survey.

The fourth criteria is an inquiry into possible bias when reports are prepared with a view to possible litigation. It is recognized that surveys may lack objectivity "because of their intended use in litigation." Colorificio Italiano Max Meyer v. S/S HELLENIC WAVE, 419 F.2d 223, 225 (5th Cir. 1969). The built-in bias of the surveyors to attribute loss and damage to the

carrier rather than the government port authority has been noted. Also, the CCC and its assignors, the private relief agencies, are Gellatly's biggest customers, as testified by Mr. Aregai and Gellatly does most of their work . (Tr.II at 68-69).

Q. Would it be fair to state your company does the majority of the surveying for the relief organizations bringing cargo into Ethiopia?

A. Yes.

Q. Would they be your largest customer?

A. Yes. (Tr.II at 68-69).

The above examination of the noted criterion for trustworthiness demonstrates that the trial judge's finding that the surveys were trustworthy was clearly erroneous and, in many instances, not supported by any credible evidence. Notably, the trial judge agreed that the survey reports were untrustworthy for all shortage claims. Appendix at C-12. That the surveys were found untrustworthy in this respect casts suspicion on the allegations that the cargo was a total loss, simply because the bags were found "wet" or "stained," especially in light of the overwhelming totality of circumstances indicating untrustworthiness.

The decisions following Beech Aircraft have allowed a report to be introduced as a public record where the moving party establishes that the report was trustworthy by calling the person who prepared the report or observed the damage. That was not the case here. Puerto Rico Port Authority v. M/V MANHATTAN PRINCE, 897 F.2d 1, 8 (1st Cir. 1990). The inability to cross-examine the persons who prepared the reports, or persons familiar with the manner in which the reports were prepared, is a factor for the Court to consider when deciding the trustworthi-

ness of a report. Hines v. Brandon Steel Deck, Inc., 886 F.2d 299, 303 (11th Cir. 1989). AREGAI OFFERED NO SUBSTANTIVE TESTIMONY concerning the preparation of these surveys. THERE, WAS NOTHING IN THE RECORD ON WHICH TO CROSS-EXAMINE AREGAI. "While the inability to cross-examine the investigator cannot per se invalidate the report since Rule 803(8) does not depend on the availability of the declarant, it is nonetheless a proper factor to take into consideration when deciding trustworthiness." Hines, 886 F.2d at 303 (citing Wilson v. Attaway, 767 F.2d 1227, 1245 (11th Cir. 1985)). **WHERE WERE GELLATLY'S SURVEYORS? THEY WERE NOT AT TRIAL!!**

By failing to call the actual preparers of the reports, the government abandoned its last chance to cure the noted deficiencies and obvious untrustworthiness of the surveys relied on by the trial court.

THE SURVEY REPORTS ARE NOT ADMISSIONS AGAINST INTEREST UNDER RULE 801(d)(2)(D).

The trial judge also erroneously admitted some survey reports allegedly prepared on behalf of Central Gulf and/or its P&I Club, Assuranceforeningen GARD. Fed.R.Evid. 801(d)(2)(D). Neither Central Gulf nor GARD requested Gellatly to perform any cargo survey on their behalf. Rec. at 776, 780-783. It was Gellatly's practice to send the same exact survey to both the cargo and vessel interests and anyone else with an interest in the barges or cargo, simply so that it could collect duplicate fees. See Rec.783. Gellatly simply substituted GARD as the party named in the surveys on whose behalf it was acting and forwarded copies of the surveys to GARD with an invoice for their services. Central Gulf testified that they did not appoint

Gellatly to perform tally and surveillance of barges, but that Gellatly was only requested to perform barge hull damage surveys by the hull underwriters. Rec. at 781.

The only indication that Gellatly was requested to attend and report on cargo discharge is that Maritime Transit and Shipping Corporation (MTSC) requested the surveys for GARD and/or Central Gulf. Rec. at 782. MTSC, an Ethiopian government-owned and operated ship agency, was designated by Ethiopia to represent Central Gulf's interest in the Ethiopian ports of Assab and Massawa. Central Gulf had no choice as to whether or not MTSC was its agent. Depo. of C. Athanassopoulos at 68; Depo. of M. Mitchell at 105-06. Central Gulf had no control or direction over MTSC nor could it direct what activities or requests MTSC undertook purportedly "on behalf of Central Gulf."

Significantly, the CCC did not even attempt to establish through "testimony of the custodian or other qualified witness" that these Gellatly discharge surveys were requested by Central Gulf or GARD. Obviously they knew such a fact could not be established. Ignoring the compulsory nature of the agency relationship between Central Gulf and MTSC and consequently the tenuous and self-serving statements of Gellatly that it was attending and reporting on cargo discharge on behalf of Central Gulf or GARD, the trial court held that the survey reports constitute statements against interest and are hence exempt from the rule against hearsay as provided by Fed.R.Evid. 801(d)(2)(D). Indeed, that the said surveys are not against interest is clearly seen from a reading of said surveys which frankly do not support cargo damage at all.

THE QUARANTINE CERTIFICATES WERE NOT AUTHENTICATED AND ARE NOT ADMISSIBLE UNDER RULE 803(8)(C).

The record is devoid of any evidence to support a finding that the quarantine certificates are authentic or admissible. The trial judge abused his discretion in admitting them in evidence.

The certificates objected to were allegedly issued by Ethiopian Ministry of Public Health, Hygiene & Quarantine Department and its counterpart in Djibouti. Rec. at 627. They are not self-authenticating pursuant to Fed.R.Evid. 902(3) as records of foreign governments. Respondent utterly failed to sustain its burden to establish authenticity and offered no "evidence sufficient to support a finding that the report was admissible[and the CCC claims] it to be. Fed.R.Evid. 901. The supposed Djibouti certificate for Claim No. 27 (Exh. P-179) is written in French and no translation was provided. The trial judge's reliance on this document was clearly an abuse of discretion. The trial judge even failed to rule on the issue of authenticity, which was an abuse of discretion ignored by the Appellate Court.

Also, the certificates were not admissible under the heresay exception. Fed.R.Evid. 801 and 802. Rule 803(8), the hearsay exception provided for public records, is not applicable to the public records of a foreign government, such as Ethiopia or Djibouti. 30 Am.Jur. 2d Evidence §967 (1967); see generally McCormick on Evidence §319 (3d ed. 1984). Neither are these documents admissible simply because they are in the possession of the United States government by virtue of the public records exception.

THE INFORMATION CONTAINED IN THE SURVEY REPORTS IS SO DEFICIENT THAT THE REPORTS FAIL TO ESTABLISH PRIMA FACIE PROOF OF CLAIMS.

Central Gulf urges this Court to reverse the Appellate Court and trial judge's ruling allowing the survey reports and condemnation certificates to be admitted into evidence. But even in the event that this Court affirms the trial court's evidentiary ruling, Central Gulf submits that the survey reports failed to establish loss or damage to cargo while in the carrier's possession, which would serve to rebut the presumption of good order upon discharge.

The trial judge's opinion indicates an individual claim analysis of surveys and related documents to support an award on thirty-seven of the fifty-two claims. Over objection, the court admitted into evidence a summary table of the claims prepared by the United States together with exhibit lists of the documents. (Exhs. Ct-1, Ct-2, P-525 and P-531) with the caveat that "the Court places absolutely no INDEPENDENT WEIGHT ON ANY OF THESE FOUR DOCUMENTS." Appendix at C-8. Notwithstanding this disclaimer, the Court only made specific fact findings on twenty-one of the claims (Nos. 2, 11, 12, 15, 16, 18, 21, 25, 26, 28, 30, 31, 42, 48, 50, 61, 62, 67, 69, 70 and 76) on which damages were awarded and merely noted its concurrence with the United States' damage assessment on the other sixteen claims (Nos. 7, 18, 19, 20, 22, 23, 25, 28, 47, 61, 53, 55, 63, 64, 68 and 75) as contained in the four documents which were to be given "NO INDEPENDENT WEIGHT."

The court's award on the later sixteen claims, means the court's opinion is clearly deficient for its failure to contain findings of fact. Moreover, of the sixteen later claims, the court

awarded damages on claims 68 and 75 where the alleged supporting survey reports (Claim 68, Exhs. P-299 and P-510; Claim 75, Exhs. P-308 and P-309) WERE NEITHER OFFERED NOR ADMITTED INTO EVIDENCE AT TRIAL. Rec. at 1264, 1266. Therefore, the trial court's award of damages on Claims Nos. 7, 18, 19, 20, 22, 23, 25, 28, 47, 51, 53, 55, 63, 64, 68, 75 on which no findings were made, is clearly erroneous and must be reversed.

Petitioner attaches as Appendix H a table entitled "Analysis of Surveys Which Shows Lack of Evidence to Support Fact Findings." That table illustrates that the survey reports lack any evidence to support the judgment entered.

Claim No. 2 involved 4,629 bags of non-fat dry milk for which the court awarded $51,285.43 for water damage. While the survey report noted 4,629 bags water damaged, it also stated that there was to be a supplementary report of the actual condition of the commodity within the bags. Exh. P-8. No supplementary report was ever offered into evidence. On Claim No. 15, the court awarded $232,990.88 for a substantial number of bags of Bulgur Wheat which the survey considered a total loss from barges CG-53, CG-762 and CG-A44. The survey notes that barges C-762 and CG-A44 were "aground effect to cargo unknown." Exh. P-563. However, a subsequent survey following discharge of barge CG-762 (Exh. P-491) shows that ONLY TEN BAGS, and not the entire barge load of 14,014 bags were stained. Yet there are no subsequent surveys of the condition of the cargo from barges CG-B53 and CG-A44; accordingly, the one survey (Exh. P-563) DOES NOT support a loss of 28,028 bags from barges CG-B53 and CG-A44. See also Depo. of M. Mitchell at 172-73. (Waterman barges aground did not result in damage to cargo.) The same surveys and the same analysis are applicable to Claim No. 16 in which the court awarded $62,377.62 for the

assumed loss of 5,852 bags of corn soya milk from barges CG-B53 and CG-A44 (aground, condition of cargo not ascertainable).

Another example is Claim No. 23 in which the court awarded damage of $130,812.39 for the assumed loss of 16,829 bags of grits from barge CG-512. There the AERO-STAR survey report notes only that the barge was aground and under salvage and that a final report was to be issued. Exh. P-174 and P-494. Again, no further AERO-STAR survey report was ever issued or offered into evidence and a subsequent Gellatly survey notes only that 16,829 bags of grits "said to be lost." Claim No. 76, on which the court awarded $393,652.88 for the loss of 18,893 pails of soy beans and salad oil, is yet another example of the obvious deficiencies in the survey report. The AFRO-STAR survey (Exh. P-312) states that 49,287 pails were discharged in good condition, while the Gellatly survey notes that 30,395 pails were discharged in good condition. Exh. P-49. The Gellatly survey assumes that 18,893 pails from barge CG-831 were a total loss based on the assumption that the pails were aboard the barge when it later sunk. But according to the AFRO-STAR survey (Exh. P-312) the 18,893 pails were discharged from barge CG-831 prior to the time the Gellatly survey was conducted. Exh. P-312. There is simply no indication from the Gellatly report that the surveyor ever looked into barge CG-831 to determine whether or not the pails were there. Exh. P-489. The inadequacy of the Gellatly survey report is clearly evident.

With the exception of one survey, Exh. P-495, the surveys are completely inadequate to establish any loss or damage to the cargo. A notation that bags were wet or stained does not establish that the contents were damaged and unfit for human consumption. The survey reports also are silent as to whether there was any attempt made whatsoever to remove, dry and recondition the allegedly "wet" and stained "bags." cf. Exh. P-495.

COGSA AND HARTER ACT DEFENSES

The trial judge clearly erred in holding Central Gulf responsible for damage to cargo in foreign-operated ports. Central Gulf had no control or custody of the cargo once the LASH barges were released from the mother vessels and delivered to the custody of government port authorities. Upon delivery to the Ethiopian, Sudanese and Djibouti governments, the LASH barges were seaworthy. Delivery, as that term is used in the Harter Act and COGSA, was accomplished when the LASH barges were released from the mother vessels. Likewise, any subsequent damage to the barges and their cargo is not Central Gulf's responsibility under the exemption provided by 46 U.S.C. §1304 (2)(q). The trial judge's erroneous ruling affirmed on appeal to the contrary should be reversed.

COGSA REQUIRED GOVERNMENT TO FURNISH NOTICE OF CLAIM TO CARRIER AND GOVERNMENT FORFEITS ITS RIGHT TO SUE BY FAILURE TO NOTIFY.

COGSA places the initial burden of establishing loss or damage during carriage on the consignee or other party representing the cargo interests.

> Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the Port of Discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the Contract of Carriage, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods described in the bill of lading. If the loss or damage is not apparent, the

> notice must be given within three days of the delivery.... 46 U.S.C. §1303(6).

The consignees, the private relief agencies who assigned their rights in the cargo to the CCC, failed to provide notice of loss or damage before or at the time the cargo was discharged, nor was notice of loss or damage provided within three days of discharge or delivery. The failure to provide notice of loss or damage required by COGSA gives rise to the presumption that the goods were delivered in good order. Thus, CCC failed its burden to prove cargo damage occurred prior to discharge. Crisis Transportation Co. v. M/V ERLANGEN EXPRESS, 794 F.2d 185, 187 (5th Cir. 1986); Pacific Employers Insurance Co. v. M/V GLORIA, 767 F.2d 229, 238-39 (5th Cir. 1985). Cargo surveys and condemnation certificates were not enough.

CENTRAL GULF CANNOT BE HELD LIABLE FOR CARGO DELIVERED TO THE GOVERNMENT-OWNED AND OPERATED PORT AUTHORITY IN AN UNDAMAGED CONDITION.

A carrier's obligation to properly discharge and deliver cargo was addressed by this court in Constable v. National Steamship Co., 154 U.S. 51, 14 S.Ct. 1062 (1894):

> No rule is better settled than that the delivery must be according to the custom and usage of the port, and such delivery will discharge the carrier of his responsibility.

Id. at 1067. In Tan Hi v. United States, 94 F.Supp. 432 (N.D.Cal. 1950), the court noted that "The common-law did not permit less nor require more in the way of delivery than the usage or law of the port dictated." Id. at 435.

The Fifth Circuit recognizes this legal precedent and has held that a carrier cannot be held responsible for loss or damage to cargo incurred when a foreign government port authority, which controls all aspects of cargo operations, takes absolute custody and control over the cargo from the carrier. Tapco Nigeria, Ltd. v. M/V WEST WIND, 702 F.2d 1252 (5th Cir. 1983); All Commodities Supplies Co. v. M/V ACRITAS, 702 F.2d 1260 (5th Cir. 1983); Allstate Ins. Co. v. Imparca Lines, 646 F.2d 166 (5th Cir. 1981); See also Farrell Lines, Inc. v. Highlands Ins. Co., 696 F.2d 28 (2d Cir. 1982), affirming, 532 F.Supp. 77 (S.D.N.Y.). The trial judge recognized that the government port authorities in Sudan, Djibouti and Ethiopia controlled all aspects of cargo operations in the port, Appendix C at 6-8, but erred, as a matter of law, in ruling that Central Gulf was responsible for cargo losses incurred after delivery of the LASH barges and their cargo to the government-operated port authorities.

It is unclear whether the trial judge made any distinction between Central Gulf's defenses of proper delivery and exemption from liability under the q clause, 46 U.S.C. §1304(2)(q). There appears to be no ruling on the defense of proper delivery and its findings with respect to the q clause defense are somewhat disjointed. Accordingly, Central Gulf discusses the court's specific reasons for failing to find Central Gulf exempt under the q clause, and to the extent they are relevant to its defense of proper delivery, Central Gulf directs the court's attention to the next section of this Brief, however, Central Gulf strongly urges that the trial judge's ruling or failure to rule on Central Gulf's defense of proper delivery alone requires reversal.

CENTRAL GULF ENTITLED TO EXONERATION FROM LIABILITY UNDER THE Q CLAUSE.

The governments in Sudan, Djibouti and Ethiopia own and operate the involved ports. The absolute government control of port activities includes the appointment of surveyors. In Assab there were only two, possibly three, surveyors allowed to work in the port. In Djibouti, the vessel agents are also privately owned companies. In all ports, however, the personnel who had direct responsibility for the LASH barges and their cargo, i.e. the tug, linehandlers and stevedores, are government-owned, controlled and operated. Tr. III. 62-63, 68-69, 88, 108-09, 174-75; Depo. of M. Mitchell 52, 65, 105-06, 162, 164-66, 168-70, 174-75; Depo. of Athanassopoulos at 11, 49-50, 56, 68, 82-83; Depo. of M. K. R. Menon at 93-99, 109-10; Depo. of K. V. Menon at 126-27, 128, 134-35, 141-44, 146-48, 150, 153. How long would Gellatly continue to be licensed as a survey firm if it found cargoes were damaged by Ethiopian government employees?

The evidence clearly establishes that extensive barge repairs were made to insure the seaworthiness of the barges. They were maintained in a class with the American Bureau of Shipping. They each were inspected and certified prior to loading by the National Cargo Bureau. Appendices I, J, and K. The factual findings which purportedly support the legal conclusions of liability are flawed and clearly erroneous. The Court's findings with respect to negligence are inextricably intertwined with the clearly erroneous findings that the Central Gulf LASH barges were unseaworthy, demonstrating that the trial judge misconstrued both the facts and the law.

In asserting a defense under the q clause, the carrier is required to show that the loss or damage to the cargo did not

result from the fault or neglect of the carrier. As Professor Tetley reports:

> It is not necessary for the defendants to establish exactly why and how the damage occurred, provided they can disprove negligence; but, of course, it is not easy to do that unless they can establish some reasonably possible alternative explanation. If the damage is entirely unexplained, it is difficult to see how the onus can be discharged.

W. Tetley, Marine Cargo Claims, 518 (3d ed. 1988) (citations omitted).

The q clause exonerates the carrier for damage which occurs while the cargo is in the exclusive custody and control of third parties, such as the African government port authorities. Since the damage occurs while the cargo is controlled by someone other than the carrier, the carrier is not in the unique position of having exclusive possession of all the information relevant to how the damage was caused. Accordingly, the strictest burden of proof usually imposed upon the carrier to prove exactly how the loss or damage occurred is NOT applied. The relevant information is in the hands of persons over whom the carrier has no control, i.e. the Ethiopian, Djibouti and Sudanese government port authorities. Most importantly, all of the African government witnesses are prohibited by law and regulation of their countries to give depositions or testify in court in the United States. Even if they were allowed to give a deposition, their testimony would be highly suspect, for, as we know, persons in communist countries risk their lives when speaking critically of their governments.

The statutory language of 46 U.S.C. §1304(2)(q) makes clear that the carrier has the burden of proving that it was not

negligent. It does not follow that the carrier must show or prove exactly how the damage or loss occurred. Central Gulf bore the burden of showing that it was not at fault and offered explanations of how the damage occurred. The record, reviewed in its entirety, demonstrates that Central Gulf abundantly satisfied its burden. The trial judge's ruling that Central Gulf had the burden of showing precisely how the damage occurred as a result of the neglect of the government port authorities is an error of law.

The LASH barge is a vessel, not a warehouse facility, to which all of COGSA's defenses apply. Wirth, Ltd. v. S/S ACADIA FOREST, 537 F.2d 1272 (5th Cir. 1976).

SOMALIA VERSUS ASSAB

The famine in Ethopia was the same being faced today in Somalia. The major difference is that today the United States and the United Nations have intervened to help, whereas in Ethopia the Respondent did nothing to help.

The conditions at Assab at the time in question were ably described by Captain Bill Dunford:

> The port was absolutely overwhelmed with cargo. Cargo was absolutely stacked, I would say, as much as forty feet in the air. I mean, they had been trying to build warehouses. The cargo just was not leaving the port area. It was absolutely incredible. It doesn't rain very much there and obviously that's what saved them, but they did have some canvas on different sections of cargo, but most of it was just open air, I mean, and you would have to see it. Naturally, pictures were not allowed. But you would have to actually see it to grasp the size and the amount of relief cargo that came into the

port and that was on the docks. It was just overwhelming. Tr.III at 115.

Also, E. L. Johnsen, Vice-President of Central Gulf, stated at Vol. III, page 7, line 16 through page 8, line 9:

A. Since as early as September of '85 when we discussed this yesterday we continually had a problem with the fact that the United States government turned their back and refused to do anything —

Q. Mr. Johnsen, my question was, sit —

THE COURT: Wait a minute. Let him finish.

THE WITNESS: — refused to do anything to assist us in the discharge of our cargo. This was government cargo, government agency and they refused to do anything to get our cargo discharged. And at the same time the government of the United States turned their head when it was all over the front of the newspaper and TV that they bulldozed this cargo ashore when it was discharged. They refused to give us demurrage on the cargo, they did not do anything to provide berthing. We did everything in our power to provide berthing. We did everything in our power to try to divert cargo or to do something to assist the United States government in discharging this cargo and they refused to do anything to help us.

Now in Somalia there is instant CNN coverage but in Ethopia there were news media reports. Central Gulf requests that this court take judicial notice of the news media reports which chronicle the reasons why food cargoes were lost in Ethopia... thieves, civil war, monsoon rain, collapse of highways and storage out in the open. Appendix L. All causes not related

to ocean carriage. KVUE INC. V. Austin Broadcawsting Corp., 709 F.2d 922 (5th Cir.1983), aff'd, 104 S.Ct. 1580 (1984); Flynn v. Hubbard, 782 F.2d 1084 (1st Cir. 1986); Fed.R.Evid. 201.

CAN TRIAL COURT'S DENIAL OF GOVERNMENT'S POST-JUDGMENT MOTION FOR A NEW TRIAL BE REVERSED IN APPELLATE COURT WITHOUT FINDING AN ABUSE OF DISCRETION BELOW?

Following the district court's entry of judgment, the government moved to amend the judgment and/or re-open the record pursuant to Rules 52(b) and 59, Federal Rules of Civil Procedure, on the assignment issue on Claims 37 through 40. Through the proper exercise of its discretion, the district court denied the government's motion for post-judgment relief. The Fifth Circuit review of the district court's denial of the government's post-judgment motions was under the abuse of discretion standard. Washington v. Patlis, 916 F.2d 1036 (5th Cir. 1990); Hoyt R. Matise Co. v. Zurn, 754 F.2d 560, 568 n.14 (5th Cir. 1985).

Rules 52(b) and 59 motions may be considered by the district court only upon certain specified grounds: Since the government did not base its post-judgment motion upon any of the grounds cognizable under Rule 52(b) or 59 the motions properly failed. The government's motion under Rule 59 to re-open the record for additional evidence may only be granted when it is adequately demonstrated that there might be newly discovered evidence. 11 C.Wright & A. Miller, Federal Practice and Procedure §§2805-2810. Here it is admitted that the "additional evidence" to be offered by the government was not "newly discovered" and would not warrant a re-opening of the record. The record below clearly established that the "additional evidence" was always within the government's possession prior to, during, and following the trial.

The standard in the Fifth Circuit for the admission of newly discovered evidence requires a showing that the proffered evidence was not known to have existed nor could knowledge of its existence have been acquired by the exercise of due diligence prior to or during the trial. Hoyt R. Matise Co., 754 F.2d at 568 n.14. The government also admitted that it did not previously offer such evidence at trial "explaining" the government's counsel failed to appreciate his burden of proof in this regard. The law is clear that neglect of counsel is not proper or a sufficient reason to re-open the record upon a motion for new trial In rejecting a similar argument and affirming the denial of a similar motion, the Fifth Circuit stated in Hoyt R. Matise Co.:

> It appears that Matise's motion is grounded on a contention available to every defeated Respondent — that it could not have foreseen the district court would reject its claim without the testimony of the absent witness. See In re Wester Corp., 434 F.2d 195, 204 (5th Cir. 1970).

574 F.2d at 568 n.14. See also Washington v. Patlis, 916 F.2d 1036 (5th Cir. 1990).

CONCLUSION

Petitioner suggests a writ of certiorari should issue for the following reasons:

Third World Communist Ethiopia's mishandling of famine relief food supplies resulted in whatever loss of food cargo that was sustained. As a result of the lower court's error in accepting into evidence deficient survey reports, a judgment was rendered imposing liability on a U.S. flag carrier for damage to cargo even though there was no admissible proof of the loss.

Central Gulf established that its LASH barges were maintained in class under the Rules of the American Bureau of Shipping. All barges were seaworthy prior to receiving the cargo and the barges and cargo were inspected by all Federal agencies who certified that the barges were in good order and condition to receive the cargo.

Central Gulf was compelled by Ethiopian law to deliver the barges and the cargo to three foreign ports. The custom of the ports, under Ethiopian law, required that only the Ethiopian Government would be permitted to determine when and where the barges' cargo would be unloaded. The government agency operating the port provided the stevedores, tugs, linehandling and/or warehousing facilities. Any loss that occurred was due to the foreign government's inefficiency and inability to properly care for the goods after delivery by the carrier. This resulted in loss of warehouse space requiring cargoes to be stacked at least 40 feet high in the open on wharves, and being subjected to all of the elements, including monsoon rains and any pilferage that might occur.

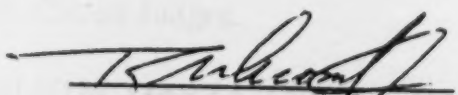
Lacking competent surveyors, the Respondent relied on reports issued by a surveying agency which admitted that it only had three surveyors on its staff and that since as many as six vessels might be unloaded in one day, the surveyors were unable to be in attendance while the cargo was being discharged. The inefficiency, ineptness and inability of the government of Ethiopia to properly handle, receive, store or survey the cargo resulted in the issuance of survey reports that did not comply with the normal rudiments of survey reports. The reports did not indicate personal knowledge of the person preparing the report, whether the goods were actually sighted and damaged, or whether, if the bags were wet, the contents of the bags were damaged.

Under Beech Aircraft v. Rainey, this Court has dictated what must be done before hearsay reports can be admitted into

evidence and the witnesses who testified by deposition or trial were unable to meet even the barest application of the Beech Aircraft trustworthiness rule.

Deleting the inadmissible reports from evidence would leave the Respondent with an absolute failure to prove a prima facie case under the Carriage of Goods by Sea Act, as is required of any litigant, even the United States Government. Secondly, the reports themselves when examined fail to accurately confirm any damage to the cargo occurring during the carrier's custody. The district court was led into error which resulted in the admission of the survey reports and this error was affirmed by the Court of Appeals, totally ignoring the evidence in the record, or lack thereof. A mere reading of the survey reports reflects that they were unreliable and untrustworthy and, therefore, not subject to admission under any hearsay exception.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing have been forwarded to all counsel of record by depositing same in the U. S. mail, postage prepaid and properly addressed this 21 day of December, 1992.

ROBERT B. ACOMB, JR

UNITED STATES of America,
Plaintiff-Appellee, Cross-Appellant,

v.

CENTRAL GULF LINES, INC., etc.,
Defendant-Appellant, Cross-Appellee.

No. 91-3789.

United States Court of Appeals, Fifth Circuit.

Oct. 9, 1992.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before VAN GRAAFEILAND, * KING and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

This appeal involves damage to famine relief cargo destined for East Africa. The United States sought recovery against the carrier, Central Gulf Lines, Inc. ("CGL"), on 52 claims for cargo damage. The district court entered judgment in favor of the United States on 37 of those claims in the amount of $3,092,344.51 plus prejudgment interest. CGL appeals the judgment against it, arguing primarily that there was insufficient evidence establishing CGL's liability for damage to cargo. The United States cross-appeals, contending that the district court (1) erred in holding that it did not have standing on four additional

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* Senior Circuit Judge of the Second Circuit, sitting by designation.

claims of cargo damage, and (2) applied an incorrect rate of prejudgment interest.

Finding sufficient evidence in the record to support the district court's judgment against CGL, we affirm. The district court erred, however, by holding that the United States did not have standing to prosecute four of the claims of cargo damage. Accordingly, we reverse that part of the district court's judgment and render judgment in favor of the United States on these additional claims.

I.

In 1985 and 1986, pursuant to the Food for Peace Program, 7 U.S.C. §§ 1721-1726 (1988), the United States through its Commodity Credit Corporation ("CCC") donated famine relief food supplies to several humanitarian relief organizations operating in East Africa.[1] CGL carried approximately 76 shipments of the food supplies to Assab and Massawa, Ethiopia; Port sudan, Sudan; and Djibouti.[2] CGL transported the cargo in lighter-aboard-ship ("LASH") vessels (mother vessels carrying barges laden with cargo).[3] In May 1985, CGL carried its first shipment of cargo to Assab, but did not have the necessary buoys to secure the LASH barges.[4] Another LASH vessel operator,

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[1] The United States transferred formal title to the goods to the organizations. Many of the relief organizations then assigned all of their rights, title, and interest to the goods to CCC. *See* Record on Appeal, Exhibit No. P291.

[2] On appeal, most of CGL's claims concern shipments made to Assab, Ethiopia.

[3] CGL transported the cargo in LASH vessels instead of carrying the shipments in conventional cargo vessels. CGL made the decision to transport the cargo via LASH vessels, and neither the United States nor the relief organizations requested that the LASH vessels be used.

[4] After the LASH barges were unloaded from their mother vessles, CGL was responsible for providing proper fleeting equipment such as buoys.

Waterman Steamship Corporation, [5] however, allowed CGL to use its buoys temporarily. CGL eventually installed three of its own buoys. Although a proper buoy for LASH barge fleeting has an anchor and a heavy link chain to secure the barges and buoys, CGL used lighter equipment–concrete blocks and wires–to secure its fleeting.

Port authorities warned CGL in early May that Assab would face cargo congestion; nonetheless, CGL did not install any additional buoy systems until at least November 1985. Instead, CGL strung a large number of barges to the few buoys it had in the port, exceeding the number of barges that a buoy, whether attached by chain or wire, is designed to hold under windy conditions. [6] As a result of the overloading and inadequate anchoring of the buoys during the monsoon season, dozens of CGL LASH barges broke away from the buoys and floated aground or sunk. Independent surveyors were hired to conduct surveys at the discharge of cargo as required by 22 C.F.R. § 211.9(c)(1)(i) (1992.) [7] The surveys showed that several shipments of cargo had been lost or destroyed. Quarantine certificates, issues by foreign entities, also described shipments of cargo that had been damaged and that were therefore unfit for human consumption.

The United States filed suit consisting of 52 claims against CGL, *in personam*, and against two of the vessels that carried some of the shipments, M/V GREEN HARBOUR and M/V DEL MAR, *in rem*, to recover damages for lost or damaged cargo. The district court entered judgment in favor of the United

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[5] Waterman, a competitor of CGL at that time, is now a corporate affiliate.

[6] From around October to April each year, Port Assab is assailed by strong monsoon winds from the south and southeast.

[7] These independent surveyors included Gellatly, Hankey & Co. ("Gellatly, Hankey"), Afro Star Commercial Agency, and Adco. The majority of the surveys in dispute, however, were prepared by Gellatly, Hankey.

States on 37 of its claims in the amount of $3,092,344.51 plus prejudgment interest at the rate provided in 28 U.S.C. § 1961 (1988). The district court dismissed without prejudice the claims against the two defendant vessels.

II.

CGL raises the following contentions on appeal:

(a) the district court erred in finding that the cargo at issue was damaged;

(b) the district court abused its discretion in admitting survey reports and quantine certificates;

(c) the district court erred in holding that the United States established a prima facie case of cargo damage; and

(d) the district court erred in holding that the United States had standing to pursue six claims for which it does not hold valid assignments.

III.

A

CGL contends that the district court erroneously found that cargo was damaged while in CGL's possession. [8] CGL

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[8] This argument consists of two components. First, CGL argues that the district court's factual determination of damage was clearly erroneous because it is unsupported by documentary evidence. Second, CGL contends that the survey reports and quarantine certificates establishing damage to cargo should not have been admitted into evidence. We discuss the evidentiary issue separately. *See infra* Part III.B.

CGL also claims that the district court did not make findings of fact on sixteen of the damage claims. *See* Brief for CGL at 26. After reviewing the district court opinion, we conclude that the district court did make findings of fact on these claims. *See* Record on Appeal, vol. 5, at 1464-65, 1471-74, 1475-79, 1492-98, 1502-07.

argues that because the district court relied on survey reports and quarantine certificates in determining the amount of cargo damaged, this Court should interpret the survey reports itself and not defer to the factual findings of the district court. Findings based on documentary evidence as well as oral, in-court testimony are subject to review under the clearly erroneous standard. *See* Fed.R.Civ.P 52(a); *Missouri Pac. R.R. Co. v. Railroad Comm'n of Tex.*, 948 F.2d 179, 181 n. 1 (5th Cir. 1991) (under Rule 52(a), clearly erroneous review applies equally to findings based on documentary evidence and those based on oral, in-court testimony); *McFarland v. T.E. Mercer Trucking Co.*, 781 F.2d 1146, 1148 (5th Cir. 1986) (same). Findings of fact are "clearly erroneous" when the appellate court, upon a review of the entire record, is "left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)); *United States v. Menesses*, 962 F.2d 420, 428 (5th Cir.1992).

[2] For the discharge of cargo from each shipment, one or more independent surveyors were hired. The surveyors prepared survey reports which detailed the type, amount, and condition of the cargo. Many of the reports state that some of the food cargo was aboard barges that sunk and therefore was completely lost or that the food cargo was damaged by water that leaked through holes in the barges. *See, e.g.*, Record on Appeal, Exhibit Nos. 563 & 575. Several of the survey reports are corroborated by other documents, usually quarantine certificates. *Compare* Record on Appeal, Exhibit No. P491 *with* No. P54 *and* No. P55. Because the facts support the district court's findings, we hold that the district court's determination that the cargo had been lost or damaged was not clearly erroneous.

B

CGL also argues that the district court erred in admitting into evidence survey reports and quarantine certificates to support the United States' damage claims. CGL maintains that the documents are inadmissible hearsay because (1) they do not meet the requirements of the public records exception, Fed.R.Evid. 803(8)(C), and (2) they are not admissions by a party opponent. Fed.R.Evid. 801(d)(2)(D). the liberal construction that has been given Fed.R.Civ.P. 43(a) by the Court favors "admission of evidence rather than its exclusion if it is of probative value." *United States v. Lykes Bros. S.S. Co.*, 432 F.2d 1076, 1077 (5th Cir. 1970). Therefore, generally, doubts should be resolved in favor of admissibility. *Id.*

[3, 4] We review the district court's admission of evidence only for abuse of discretion. *See United States v. Loney*, 959 F.2d 1332, 1340 (5th Cir. 1992). We review the district court's findings of fact on these issues for clear error. *See* Fed. R.Civ.P. 52(a); *Missouri Pac. R.R. Co. v. Railroad Comm'n of Tex.* 948 F.2d 179, 181 n. 1 (5th Cir. 1991) (district court's determination that state regulation was preempted by federal statute not clearly erroneous because finding was plausible in light of entire record).

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CGL contends that the survey reports and quantine certificates were inadmissible hearsay because they did not fall within the public records exception. *See* Fed.R.Evid. 803(8)(C).[9]

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[9] Rule 803(8) provides:
Public records and reports. Records, reports, statements, or data compilations, in any form, setting forth... (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

First, CGL argues the survey reports should not have been admitted because (1) the people who prepared the survey reports did not have personal knowledge of the matters reported, and (2) the survey reports indicate lack of trustworthiness. Second, CGL contends that the district court abused its discretion in admitting the quarantine certificates because there is no law of the foreign nation requiring the keeping of such certificates.

[5] Cargo survey reports are admissible pursuant to Rule 803(8)(C) provided that three requirements are met. *See United States v. Central Gulf Lines,* 747 F.2d 315, 319 (5th Cir.1984) (*"Central Gulf I"*).[10] First, the person making the report must have observed the matters contained in the report firsthand. Second, the report must be prepared pursuant to a duty imposed by law.[11] Third, the documents and surrounding circumstances must indicate trustworthiness. *Id.*

To satisfy the first element of Rule 803(8)(C), "the record sought to be admitted must be made from matters within the personal knowledge of the public official making the record or

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[10]The district court admitted the survey reports as public records under Rule 803(8)(C). In this appeal, CGL also relies on Rule 803(8)(C) to argue that the survey reports are not within the hearsay exception under the public records rule. In *Central Gulf I*, however, we held that survey reports are admissible as public records under Rule 803(8)(B). Rule 803(8)(B) provides a hearsay exception for public reports where "matters [are] observed pursuant to duty imposed by law as to which matters there was a duty to report." We find no significant difference between Rules 803(8)(B) and 803(8)(C). We also note that while the district court relied on Rule 803(8)(C) to admit the survey reports, it applied a test identical to the three-part test articulated by this Court in *Central Gulf I*.

[11]The second element of Rule 803(8)(C) – that the record be prepared pursuant to a duty imposed by law – is not in dispute. Independent surveyors such as Gellatly, Hankey are required under 22 C.F.R. § 211.9(c)(1)(ii) (1992) to attend the discharge of cargo and prepare reports detailing the quantity and condition of cargo.

his agent or someone with a duty to report the matter to a public official." *Id.* CGL contends that none of the surveyors from Gellatly, Hankey who had prepared the reports had observed the matters within the reports.[12] CGL argues that both the witnesses who were deposed and those who testified did not know whether the persons who prepared the reports actually observed the matters within the report. We disagree. Goyton Aregai, a general manager in one of the Ethiopian offices of Gellatly, Hankey, testified that its surveyors were in attendance during the discharge of cargo. *See* Record on Appeal, vol. 7, at 63. In addition, Costas Athanassopolous, an employee of Waterman, testified that the surveyors were always present during the discharge of cargo. [13] *See* Deposition of Costas Athanassopolous at 9.

CGL further claims that the surveys themselves demonstrate that the preparers of the reports lacked personal knowledge of the matters contained in the reports. CGL bases its argument on the fact that some of the survey reports contain the language "said to be." These survey reports were, however, corroborated by quarantine certificates. *Compare* Record on Appeal, Exhibit No. P491 *with* No. P54 *and* No. P55. We hold that the survey reports were within the personal observation of those with a duty to report the matter to a public official, and therefore the evidence satisfied the first element of Rule 803(8)(C).

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[12] CGL also maintains that the witnesses at trial did not prepare the reports. Under Rule 803(8)(C), a document need not be attested by the preparer in order for it to be admissible.

[13] CGL also claims that employees, who were not qualified surveyors, often conducted the surveys during the discharge of cargo. Accordingly, CGL argues that the surveys should be admissible under Rule 803(8)(C) because the surveyors who signed the reports did not personally attend the discharge of cargo from LASH barges. As stated above, however, witnesses testified that surveyors were always present during the discharge of cargo.

[6] In order to satisfy the third element of Rule 803(8)(C), the reports offered must not indicate a lack of trustworthiness. The Advisory Committee Note to Rule 803(8)(C) offers a nonexclusive list of factors to be considered in determining the trustworthiness of such reports: (1) the timeliness of the investigation; (2) the experience of the official; (3) whether a hearing was held; and (4) possible bias when the reports are prepared in anticipation of litigation. *See*, U.S.C. App. at 786 (1988); *see also Beech Aircraft Corp. v. Rainey*, s488 U.S. 153, 168 n. 11, 109 S.Ct. 439, 449 n. 11, 102 L.Ed.2d 445 (1988); *Koonce v. Quaker Safety Prod. & Mfg.*, 798 F2d 700, 720 (5th Cir.1986). We review the district court's factual findings as to the adequacy of the survey reports for clear error. *See* Fed.R.Civ.P 52(a); *Missouri Pac. R.R. Co. v. Railroad Comm'n of Tex.*, 948 F2d 179, 181 n. 1 (5th Cir.1991).

[7] CGL again claims that the surveys were not based on personal knowledge. [14] As discussed above, however, there is sufficient evidence to support the district court's finding that the surveys were based on personal knowledge. CGL also argues that the surveys failed to adequately record the cause, nature, and

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[14] CGL also claims that employees, who were not qualified surveyors, prepared some of the reports and therefore lacked the necessary experience. We disagree because the evidence presented indicates that qualified surveyors were present during the discharge of cargo.

extent of damage. [15] We find, however, that the surveys did contain information as to the type and condition of cargo on board the CGL's LASH vessels. *See, e.g.,* Record on Appeal, Exhibits Nos. 489, 559, 575.

Finally, CGL argues that the surveys were biased because they were prepared in anticipation of litigation. CGL did not, however, present evidence at trial establishing that any of the surveyors were government-owned or controlled. Furthermore, there was no showing that any of the surveyors ever held any interest in CGL or any other carrier, in any of the consignees, in any of the cargo, or in any of the other aspects of the port operations. Therefore, there is not evidence to indicate that the Gellatly, Hankey surveyors were biased.

Because there is sufficient evidence to support the district court's findings of fact with respect to the admission of the survey reports into evidence, we hold that those findings were not clearly erroneous. Consequently, the district court did not abuse its discretion by admitting the survey reports under the public records exception of Rule 803(8)(C).

[8] CGL also contends that the district court abused its discretion by admitting into evidence quarantine certificates.

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[15] Acknowledging that the "survey reports were not as detailed as those typically issued by American cargo surveyors," the district court rejected CGL's argument, stating that:

> As the CCC (Commodity Credit Corporation) itself recognizes, despite its aim and desire, it cannot always demand from these impoverished third-world nations survey reports that, through economic forces and regulation, would be considered [ ] adequate in more competitive and thriving ports and countries.

Record on Appeal, vol. 5 at 1466.

Further, the district court stated, "CGL never complained at the time about the method of accuracy that any surveyor was conducting his survey." *Id.* at 1466-67.

CGL argues that the quarantine certificates are hearsay and not within the public records exception, Fed.R.Evid. 803(8)(C), because there is no law of the foreign nation requiring the keeping of such records.

CGL's argument lacks merit because the quarantine certificates are admissible as public records kept by the CCC as a public agency of the United States government. As this Court stated in *United States v. Lykes Bros. S.S. Co.*, 432 F.2d 1076, 1077 (5th Cir.1970), "the duty to prepare the report can be delegated, under government regulations, to an independent agency or to a foreign government without the report losing its character when submitted through the appropriate United States agency, as a report of a department or agency of the United States." *Id.* at 1079 (condemnation certificate prepared by Korean officials admissible as government record).

We hold that the government quarantine certificates were admissible under Fed.R.Evid. 803(8)(C) under the same rationale and similar findings of trustworthiness as were made with respect to the survey reports; and that therefore the district court did not abuse its discretion in admitting the quarantine certificates.

2

[9] CGL similarly contends that the survey reports were not admissible as admissions by a party opponent under Rule 801(d)(2)(B). We find, however, that the survey reports were also admissible as admissions by a party opponent.[16] A representative of Gellatly, Hankey met with a representative of CGL

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[16]Rule 801(d)(2)(B) provides:

Admission by a party-opponent. The statement is offered against a party and is... (B) a statement of which the party has manifested an adoption or belief in its truth.

several times while Gellatly, Hankey was preparing survey reports concerning cargo on CGL's LASH barges. *See* Record on Appeal, vol. 7, at 58-59. In addition, CGL never objected to the survey reports prepared by Gellatly, Hankey. *See id.* Because there is sufficient evidence to support a finding that CGL adopted the statements made in the survey reports, the district court did not abuse its discretion in admitting the survey reports into evidence under Fed.R.Evid. 801. *See United States v. Loney*, 959 F.2d 1332, 1340 (5th Cir.1992).

C

CGL argues that it is exonerated from liability for the damage to the cargo under the governing substantive law, the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1300-1315 (1988). CGL contends that port authorities and port conditions were responsible for the damage. In claiming that it is exonerated from liability, CGL relies on 46 U.S.C. § 1304(2)(q) (1988), the catch-all exception to liability under COGSA.

A prima facie case of cargo damage is established where the cargo was "'loaded in an undamaged condition, and discharged in a contaminated condition.'" *Quaker Oats Co. v. M/V Torvanger*, 734 F.2d 238, 240 (5th Cir.1984) (quoting *Socony Mobil Oil Co. v. Texas Coastal & Int'l., Inc.*, 559 F.2d 1008, 1010 (5th Cir.1977)). Once a prima facie case is established, a party may rebut the presumption by relying on § 1304(2)(q). Under § 1304(2)(q), "the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of its agents or servants of the carrier contributed to the loss or damage." 46 U.S.C. § 1304(2)(q) (1988). "The carrier's burden of establishing 'his own freedom from contributing fault... is no mere burden of going forward with evidence, but a real burden of persuasion, with the attendant risk of nonpersuasion." *Quaker Oats*, 734

F.2d at 241 (quoting Grant Gilmore & Charles L. Black, *The Law of Admiralty* §§ 3-37, 3-43 (2d ed. 1975)). As this Court stated in *Quaker Oats*, the carrier can rebut the prima facie case only where it "first prove[s] what th[e] 'other cause' was." *Id.* at 243.

The parties stipulated in the pretrial order that all cargo was delivered to CGL in good order. The government presented evidence that cargo was damaged or lost upon delivery. Therefore, the government established a prima facie case of cargo loss or damage. CGL attempts to rebut the prima facie case under § 1304(2)(q) by claiming that (1) it relinquished control of the cargo to port authorities, and (2) cargo congestion, flood, and related problems existing in Assab caused the cargo loss. [17]

[10] First, CGL claims that it relinquished control of the cargo to Assab port authorities who allegedly had absolute duty and control over the port. CGL further alleges that the port authorities were responsible for the cargo damage because they did not provide enough space to discharge the barges and improperly secured the barges. There is evidence, however, that after unloading cargo from the mother vessels, CGL could instruct the port tug authorities as to the discharge of cargo, and that the port tugs would often follow CGL's instructions. *See* Deposition of Michael J. Mitchell at 166, 169-70. In addition, CGL independently made the decision to use LASH barges and buoys attached to rope, wire, and concrete blocks. *See* Deposition of M.K.R. Menon at 95. Accordingly, we find that CGL did

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[17] CGL also argues that the district court erred by finding that the LASH vessels were unseaworthy. We do not review this finding because even if the LASH vessels were seaworthy, CGL fails to rebut the prima facie case of cargo loss by showing another cause of the cargo loss. In addition, CGL's argument focuses on the condition of the barges at the time they were loaded with the cargo. The district court's finding, however, was based on the unsuitability of LASH vessels for the prevailing conditions in Assab.

not relinquish full control and responsibility to port authorities, and reject CGL's attempt to pass responsibility to port authorities. CGL also argues that the port authorities committed various acts which caused cargo loss. However, CGL only makes general claims of wrongdoing and fails to point out evidence of specific acts committed by the port authorities which caused specific damage to the cargo. *See* Brief for CGL at 33, 36-41.

[11] Second, CGL attempts to absolve itself from liability by arguing that cargo congestion, flooding, and other related problems caused the cargo damage. CGL only discusses general port conditions and fails to point out evidence showing that the conditions were the specific cause of cargo damage. *See* Brief for CGL at 33, 34-35. Because there is no evidence showing that some other cause was responsible for the damage to the cargo, the district court's finding that CGL did not rebut the United States' prima facie case of cargo loss was not clearly erroneous. We, therefore, affirm the district court's finding that CGL is responsible for the lost and damaged cargo.

D

CGL also argues that the district court erred by finding that the United States had standing to pursue six claims of cargo loss. [18] CGL contends that the United States was barred from bringing those causes of action by the statute of limitations as set forth in 46 U.S.C. § 1303(6) (1988). Private parties, such as the relief organizations, have one year from the date of delivery to file a COGSA claim for cargo loss. *See* 46 U.S.C. § 1303(6). Where, as here, the United States asserts a claim on behalf of

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[18] At issue are claim numbers 45, 47, 48, 50, 51 and 53. *See Brief for CGL* at 46.

CCC, the United States is subject to the longer statute of limitations period of six years. *See* 15 U.S.C. § 714b(c) (1988). Because the United States could only receive rights possessed by the assignors at the time of assignments, *see United States v. Currency Totalling $48,318.08*, 609 F2d 210, 214 (5th Cir. 1980), the private relief organizations must have had causes of action not barred by the statute of limitations when they assigned their rights to CCC. Therefore, for the United States to have standing, CCC must have received the assignments within one year from the date that the cargo was delivered.

[12, 13] CGL argues that, because six of the assignments that CCC received were undated, there is no evidence that CCC received the assignments within one year from delivery. Therefore, CGL argues that the United States is barred from bringing causes of action arising from those assignments. Under federal law, prescription is an affirmative defense. *See* Fed.R.Civ.P. 8(c); *Davis v. Huskipower Outdoor Equipment Corp.*, 936 F.2d 193, 198 (5th Cir. 1991) (defendant waived statute-of-limitations defense by failing to raise it in pleadings). Because an affirmative defense places the burden of proof on the party pleading it, *see United States v. MMR Corp. (LA)*, 907 F.2d 489, 499 (5th Cir. 1990) (burden of proving the affirmative defense of withdrawal is on the defendant), *cert. denied*, ___ U.S. ____, 111 S.Ct. 1388, 113 L.Ed.2d 445 (1991); *Miranda v. National Transp. Safety Bd.*, 866 F.2d 805, 809 (5th Cir. 1989) (pilot had burden of proving affirmative defense that "he moved aircraft to avoid a potential collision with another aircraft"), CGL had the burden to prove that the assignments were made more than one year after delivery of the cargo. CGL presented no evidence showing that the assignments were made after one year from the date of delivery. Because CGL merely argues that the lack of dates makes it unclear when the assignments were made, CGL fails to meet its burden of proof. The district court's finding that

the United States had standing to pursue the six claims of cargo damage was not clearly erroneous.

IV

The United States cross-appeals, contending that (a) the district court erred in holding that the United States did not have standing to pursue four claims, and (b) the district court erred in applying the rate of prejudgment interest provided in 28 U.S.C. § 1961.

A

The United States contends that the district court erred by finding that the United States lacked standing on four claims of cargo damage. [19] The district court found that four of CCC's purported assignments were not executed and were therefore invalid because the assignments: (a) were unsigned; (b) were not on the consignee's stationery; and (c) bore no seal or other identifying mark. Consequently, the district court concluded that the United States could not pursue claims on behalf of the CCC arising from the four assignments. The United States contends that it had standing because the assignments were valid. [20]

[14] A valid assignment may be made either orally or in writing. Restatement (Second) of Contracts § 324, at 37 (1981). Comment (a) of section 324 states that "aside from statute, the assignor of such a right may make an assignment by manifestation of intention without any particular formality." *Id.* One

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[19] At issue are claim numbers 37, 38, 39, and 40. *See* Brief for United States at 38.

[20] Because we find that the assignments at issue were valid, we decline to address the United States' argument that it had standing to pursue the four claims of cargo damage as a real party in interest.

commentator states that "there is no required form in which an assignment for value must be made; all that is necessary is for the assignor so to express himself as to indicate an intention then and there to transfer his right to the assignee." 4 Arthur L. Corbin, *Corbin on Contracts*, § 879, at 528 (1951 & Supp. 1991) (footnotes omitted). Thus, no formalities are required for an assignment to be valid. The district court, however, erroneously concluded that the assignments were invalid because of the lack of formalities. Therefore we reverse the district court's finding that the United States did not have standing on four claims of cargo damage.

B

[15] The United States also contends that the district court erred by awarding prejudgment interest at the rate provided in 28 U.S.C. § 1961 (1988) rather than at the average Treasury bill rate over the period of time in question. [21] Under admiralty law, "the awarding of prejudgment interest is the rule rather than the exception." *Reeled Tubing, Inc. v. M/V CHAD G*, 794 F.2d 1026, 1028 (5th Cir.1986). Setting the rate of interest on a judgment is within the "broad discretion" of the district court. *Id.* at 1029 (no abuse of discretion where district court awarded prejudgment interest at rate provided in 28 U.S.C. § 1961). The district court is entitled to look to "the judgment creditor's actual cost of borrowing money or to other reasonable guideposts indicating a fair level of compensation." *Bosnor, S.A. De C.V. v. Tug L.A. Barrios*, 796 F.2d 776, 786 (5th Cir.1986). Where plaintiffs have failed to provide evidence that they had actually borrowed money and incurred higher interest costs, this Court has generally rejected plaintiffs' arguments that they should have been awarded prejudgment interest at a higher rate. *See, e.g., Bosnor*, 796 F.2d at 786 (no abuse of discretion in district court's

[21] CGL does not contest the United States' entitlement to prejudgment interest.

award of prejudgment interest at 11%, where average interest rate for 3-month T-bills was 11.125% and average daily prime lending rate was 15.45%); *Gator Marine Service Towing, Inc. v. J. Ray McDermott & Co.*, 651 F.2d 1096, 1101 (5th Cir. 1981) (no abuse of discretion where district court awarded prejudgment interest at 10%, and where plaintiff failed to show borrowing costs exceeded 10%). Finding no abuse of discretion, we hold that the district court did not err in awarding prejudgment interest at the rate provided in 28 U.S. C. § 1961 rather than at the average T-bill rate.

V

For the foregoing reasons, we AFFIRM the district court's judgment against CGL. We REVERSE, however, that part of the district court's judgment holding that the United States did not have standing on four additional claims of cargo damage, and render judgment in favor of the United States on these additional claims.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-3789

D.C. Docket No. CA 88 4505 "J"

UNITED STATES OF AMERICA,
Plaintiff-Appellee
Cross-Appellant,

versus

CENTRAL GULF LINES, INC.,
ETC.,
Defendant-Appellant
Cross-Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana

Before VAN GRAAFEILAND[1], KING and EMILIO M. GARZA, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the District Court's

[1] Senior Circuit Judge of the Second Circuit, sitting by designation.

judgment against Central Gulf Lines is affirmed; the part of the District Court's judgment holding that the United States did not have standing on four additional claims of cargo damage is reversed, and judgment is rendered in favor of the United States on these additional claims.

IT IS FURTHER ORDERED that defendant-appellant/cross-appellee pay to plaintiff-appellee/cross-appellant the costs on appeal to be taxed by the Clerk of this Court.

October 9, 1992

ISSUED AS MANDATE:

_____

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

December 8, 1992

Mrs. Loretta G. Whyte, Clerk
United States district Court
500 Camp Street, Room C151
New Orleans, LA 70130

No. 91-3789 - USA - vs - Central Gulf Lines, Inc.
USDC #CA 88-4505J

XX Enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

Enclosed to you only is a certified copy of the Rule 47.6 Decision in the above case issued as and for the mandate.

The Court having denied the motion for stay of mandate, enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

Copy of the Court's opinion.

XX Original record on appeal or review. 9 Volumes

XX Other original papers forwarded with record.
___ Envelope 3 Box

Bill of Costs approved by this Court. Copy enclosed to counsel.

CC: (Letter only)
Hon. Patrick E. Carr
Mr. Robert Acomb, Jr.
Mr. Thomas L. Jones

Sincerely,
Richard E. Windhorst, Jr., Clerk

By: [s]_____
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA — Civil Action

VERSUS — No. 88-4505

CENTRAL GULF LINES, INC., ET. AL. — Section "J"

OPINION

CARR, J.

This matter came before the Court for trial without a jury on December 5-7, 1990. The Court now rules as follows. To the extent the following findings of fact constitute conclusions of law, the Court adopts them as such; to the extent the following conclusions of law constitute findings as fact, the Court adopts them as such.

This is a maritime case for cargo loss. In 1985 and 1986, the United States through its Commodity Credit Corporation (CCC) donated various staple food products to various humanitarian relief organizations operating in East Africa. Central Gulf Lines, Inc. (CGL) carried over one-hundred thousand tons of these products to four ports on six voyages under at least 76 bills of lading; several of the shipments were ultimately damaged or short-landed. The United States is now suing CGL for these losses.

The United States alleges that the LASH (lighter-aboard-ship) barges CGL used were unseaworthy at least for use in

Assab, Ethiopia during the monsoon season and that CGL was negligent in not providing adequate fleeting equipment in that port. CGL asserts that the United States lacks standing for many of these claims and cannot establish short or bad delivery on any of these claims and that any damage occurred after the cargo had passed into the exclusive control of the government agencies who controlled these ports.

I.

The plaintiff in this action is the United States of America. It is pursuing this action on behalf of the CCC, a federal agency within the Department of Agriculture, see 15 U.S.C. §§ 714-74m.

The defendants in this action are CGL, in personam; the M/V GREEN HARBOUR, its engines, etc., in rem; and the M/V DEL MAR, its engines, etc., in rem. CGL has its principal place of business in New Orleans. Neither defendant vessel was arrested, nor has anyone made a claim or filed a stipulation on either's behalf.

A. The Beginning

Under the Food for Peace Program, see 7 U.S.C. §§ 1721-1726, the CCC donates agricultural commodities to several voluntary relief organization such as Catholic Relief Services, the International Committee of the Red Cross, World Vision Relief Organization , and Save the Children Federation as well as to certain foreign government agencies such as Sudan's Ministry of Finance and Economic Planning and Ethiopia's Relief and Rehabilitation Commission--all in an effort to meet famine or other urgent or extraordinary requirements in third-world countries such as Ethiopia, Sudan, and Djibouti.

In the mid-1980's, the CCC and/or several of these relief organizations sought bids from ocean carriers to transport such relief cargo from the United States to four ports on or near the Red

Sea; Port Sudan (Bur Sudan), Sudan; Assab (Aseb) and Massawa (Mits'iwa), Ethiopia; and Djibouti, Djibouti. CGL submitted the low bids for at least 76 shipments totalling over 100,000 long tons of such cargo; receiving freight payments between $121.06/ metric ton ($123/long ton) and $149/metric ton ($151.39/long ton), compare Exh. P284 with Exh P2, CGL thus stood to receive well over $10 million for its services.

Rather than use a conventional cargo ship, CGL decided to transport these cargoes in LASH barges in two LASH vessels it either owned or had under bareboat charter, the M/V GREEN HARBOUR and the M/V DELTA MAR. Neither the CCC nor any of these relief organizations requested that LASH vessels be used. Cf. 46 U.S.C. § 1241(b)(1) (requiring merely that at least 50% of the gross tonnage to be shipped be "on privately owned United States-flag commercial vessels"). The business decision to use LASH vessels was CGL's alone.

Six voyages are involved here, with the months of arrival at the corresponding Africa ports as follows:

G/H No. 28	5/85	Assab, Massawa, and Djibouti
D/M No. 2	8/85	Port Sudan
G/H No. 30	9/85	Assab and Massawa
D/M No. 3	10/85	Assab
D/M No. 4	12/85	Assab, Massawa, and Djibouti
D/M No. 5	2/86	Assab, Massawa, and Djibouti
D/M No. 6	4/86	Assab and Massawa

CGL had operated in these ports previously.

B. Assab

As published reports show, see, e.g., Exh. P357 at 82; see also Exh. P358 at 10184, and as carriers calling on Assab should well know, the port of Assab is subjected to continual, strong

monsoon winds from the south and southeast every year during the period from around October to April.

Concomitant with its decision to use LASH barges, CGL bore the sole responsibility to provide the fleeting equipment--namely, buoys, lines, anchors, chains, fenders, etc.--for its LASH barges after they were unloaded from their mother vessel in Assab. See also E. L. Johnson's Depo. at 30-31; K. V. Menon's Depo. at 22-24. When the GREEN HARBOUR first arrived in Assab in May 1985, however, CGL did not bring or already have buoys of its own for use in Assab. Another LASH vessel operator calling on Assab at the time, Waterman Steamship Corporation (which was then a competitor of CGL but is now a corporate affiliate of CGL, see Trial Transcript, Day Three, at (Tr.III:) 60), permitted CGL to share its buoys temporarily. See Exh. P426-P427. While CGL was to provide at least five buoys and there was sufficient room in the harbor for these buoys, see id., CGL provided instead only three, see Exh. P432; Mr. Hannan, CGL's Vice-President of Operations at the time, could not explain why CGL provided only three.

A proper buoy for LASH barge fleeting has a large anchor and a heavy link chain to hold the buoy and barges in place. The cost for a proper buoy/tackle system is around $6000-$8000. See Mitchell's Depo. at 129-130. Yet over the objections of a local employee, see K. V. Menon's Depo. at 41-43, CGL chose to use an inferior tackle set-up ("concrete blocks and wires" in place of the much heavier anchors and chains such as Waterman had) because, in CGL's words, it "fe[lt]" it "need[ed] only temporary arrangements." See Exh. P427. Immediately, at least only buoy CGL had then had transferred from its operations in Port Sudan and dropped in Assab with a wire instead of a heavier chain began to drift. See Exh. P432.

Despite warnings in early May 1985 that Assab would be facing cargo congestion, CGL did not bring any more buoy/tackle systems to Assab until at least late November 1985. See, e.g., K. V. Menon's Depo. at 79-80. With so few buoys, CGL had to string up large numbers of barges to each buoy--with vastly more barges per buoy than any buoy, whether attached to a thick chain or their wire is intended to hold in windier conditions.

While barely sufficient during the calmer summer months, cf. Exh. P432, the combination of CGL's having buoys that were too few in number and too light in weight proved woefully inadequate once the annual monsoon season began. Beginning the end of September 1985, dozens of CGL barges began to break away and thereafter float aground or sink with regular frequency up through December 1985 and then again in February 1986. When the Assab port authorities advised that CGL needed more buoys, see Exh. P449, CGL acknowledges its problem and responded that it would bring more buoys *if* it brought more barges to the port, see Exh. P450.

As Mr. Vinas, a naval architect who designed the LASH barge system, and Mr. Waller, a naval architect who conducted motion studies for LASH barges facing wave conditions roughly comparable to Assab's, explained and as the sea water ingress into many of CGL's barges at Assab confirms, a LASH barge is not designed to withstand Assab's monsoon-type conditions, at least when the barge is strung up with several other LASH barges to the same buoy as was the case here. While Mr. Goldman, for whose company Mr. Vinas had worked and who is a substantial stockholder in CGL, testified that LASH barges can be offloaded from the mother vessel in eight-foot seas, he admitted that he was never involved in any design or testing for LASH barges in large fleeting conditions similar to those CGL's barges faced in Assab. See Tr.III:57-59.

While a LASH barge ought not sink on a breakaway, see also Mitchell's Depo. at 107, many of CGL's barges in Assab did. Further, despite negative tests by the USDA and NCB for infestation and dryness, many of CGL's barges in Assab showed visible evidence of poor maintenance (as CGL already knew, see K. V. Menon's Depo. at 70-71): from rust to holes to inoperable winches. Indeed, immediately after these shipments, CGL had 56 of these barges completely scrapped in Pakistan and another 27 (still with cargo inside) salvaged and reconstructed in Singapore. See Exh. P526 at 12140; see also Exh. P527 at 12091-12092.

CGL maintains that the Ethiopian government exercised complete and exclusive control over the LASH barges in Assab once they were discharged from the mother vessel and thus that CGL cannot be responsible for any losses arising thereafter. While accepting that the Ethiopian government held the legal authority to dictate all operations in the Assab port, the Court otherwise squarely rejects CGL's position. First, CGL presented no probative evidence that a port tug damaged any of the CGL barges at issue here. Second, Waterman suffered no breakaways during the same period. See Exh. P393 at 2; Mitchell's Depo. at 89-90. Third, the CGL and Waterman employees in the port throughout the period admitted that they could generally direct the port tugs as to the order and manner for discharging the cargo from the barges and that the tugs would generally follow their directions. See, e.g., Mitchell's Depo. at 166, 169-170; K. V. Menon's Depo. at 132; M. K. R. Menon's Depo. at 94-95. Fourth, it was CGL's decision alone to moor the large number of barges it did to each buoy. Cf. also M. K. R. Menon's Depo. at 94. Sixth, as mentioned above, it was CGL's responsibility to provide its fleeting equipment and, of course, otherwise-seaworthy barges. Seventh, CGL's failure to provide sufficient buoys, lines, and fenders hampered the port gangs' ability to perform proper fleeting operations. Cf. also K. V. Menon's Depo. at 155-156.

The Court rejects the generalized testimony to the contrary by Captain Dunford and Mr. Nazareth. While graphically describing the huge quantities of cargo that were stacking up in the port at this general time, Captain Dunford showed no personal knowledge as to the cause of any cargo damage at issue here. See Tr.III:107-118. Expense reimbursement requests that CGL submitted to its hull underwriters, see Exhs. P376-P377; see also Tr.III:101-105, squarely discredit Mr. Nazareth's testimony that he spent any significant time in Assab, especially during any cargo unloading; further, he was not there at all before February 1986.

CGL complains that the Assab port authorities refused to let CGL use a private tug, the M/V OCEANIC MARINER, to help with CGL's barge problems. While the port authorities denied CGL permission to use this tug for a period less than two weeks in November 1985 immediately upon the tug's return to Assab, the Court rejects the inference CGL would draw that the port authorities, and not CGL, was responsible for the losses here. First, CGL sent the tug to other ports in June 1985 for its own business reasons. See K. V. Menon's Depo. at 58-59; see also id. at 72, 74. Second, the port authorities permitted use of this tug when theirs was unavailable or could not reach the place at issue. See id. at 54-55. Finally, CGL did not show that this tug's further availability would have prevented any particular cargo loss.

C. Port Sudan, Djibouti, and Massawa

The parties introduced considerable evidence about the general conditions in the Assab port. But they introduced hardly any probative evidence about the general conditions in the other three ports. At most, CGL showed that, like Assab, these three ports were government controlled; at least in Djibouti, however, the stevedores and local shipping agents are private, see Tr.III:88-89. A preponderance of the evidence failed to show that condi-

tions--whether meteorological, political, technical, or otherwise--at any of these three ports contributed in any way to any cargo losses in these three ports; indeed, CGL apparently concedes as much with its argument that the CCC and/or the consignees should have permitted or helped CGL to divert more cargo from Assab to either Massawa or Djibouti.

D. Cargo Loss: In General

Over CGL's strenuous objection, the Court permitted the government to introduce a summary table showing what the government claims as the loss for each of the bills of lading at issue here, see Exh. P525; at the Court's request, the government also introduced an exhibit listing the documents that the government alleged supported each of the individual claims, see Exh. Ct-1. While these exhibits (along with Exhs. P531 and Ct-2, a similar table and cross-reference for what the government contends the Gellatly Hankey surveys from CGL and GARD's files substantiate) were helpful in guiding the Court through the several hundred documents introduced into evidence, the Court places absolutely no independent weight in any of these four documents.

For each particular claim, the Court has independently and laboriously examined all the exhibits to which the parties have specifically pointed as well as certain exhibits the Court noted on its own review of these exhibits. Attached as Appendix "A" to this opinion is the Court's own summary table of the amount it finds was lost, damaged, misdelivered, or otherwise not properly delivered on, and should be awarded for, each claim (numbered as appears in Schedule A to the plaintiff's complaint); attached as Appendix "B" to this opinion is a cross-reference table for the various exhibits the Court found to relate to each claim.

For each particular claim, the Court determined the dollar value of the loss by multiplying the net loss in pounds by the C&F

(cargo and freight) unit price per pound. The Court determined the C&F price by the following formula:

$$\text{C\&F Price} = \frac{\text{net weight on bill of lading} \times \text{cargo unit price} + \text{gross weight on bill of lading} \times \text{freight unit price}}{\text{net weight on bill of lading}}$$

While the figures listed on Appendix "A" for C&F prices are rounded to one ten-thousandth of a cent, the Court--in order to avoid statistical error generated from rounding numbers--used a calculator that did not round off these prices; thus, one may find that the product of a rounded-off C & F figure on Appendix "A" by the corresponding net weight loss figure on Appendix "A" differs up to 50¢ from the corresponding dollar loss value figure on Appendix "A".[1] In determining the unit price for the cargo on

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[1] The Court illustrates with Claim No. 15. If the exact figures shown on Appendix "A" were used, the dollar loss value would be as follows: (16.58959¢/lb) x (1,404,750 lbs) = $232,990.43

However, the actual C&F value -- when not rounded to just four decimal places -- is slightly larger: (((3,499,900 lbs.) x (10.4087¢/lb)) + ((3,534,899 lbs) x ($137/2240 lbs))) / (3,499,900 lbs) = 16.58593214¢/lb.

Thus, the numbers the calculates used for the dollar loss value computation differ slightly as follows from the first calculation in this footnote: (16.58593214¢/lb) x (1,404,750 lbs) = $232,990.88

The Court has, however, used the dollar loss value figures rounded off to their nearest cent. Because the dollar value loss figures are not themselves multiplied by other numbers in order to arrive at a judgment value but are only added together; the magnitude of any errors or inaccuracies from rounding should be minimal (at most, the "true" final judgment value might be a few cents larger or smaller than the actual judgment amount awarded); thus, the Court finds that the ease of adding rounded dollar loss value figures outweighs any greater precision in using unrounded dolar loss value figures.

a particular bill of lading, the Court generally relied on a USDA Notice of Commodity Availability document that contained one or more cross-reference numbers tying it to the bill of lading; as noted on Appendix "B", in the few instances where no such corresponding document was provided, the Court determined the cargo's unit price by dividing (a) the shipper's declared value figure on the bill of lading by (b) the net cargo weight figure on the bill of lading. Following the usage in the parties' documents, see, e.g., Exh. P1 ¶ 38(A): Exh. P60, the Court uses the exact number "2.2046" for the number of pounds in a kilogram.

For discharge of the cargo from each of the shipments, one or more surveyors were appointed. There was no probative evidence that any of the surveyors were government-owned or -controlled. All agree that there were few surveyors in these four ports; indeed, the evidence did not show that there were any more than three in Assab (Gellatly, Hankey & Co., Afro Star Commercial Agency, and Adco), one in Massawa (Gellatly, Hankey & Co.), one in Port Sudan (Geriza Trade & Services Co. Ltd.), and one or two in Djibouti (Gellatly, Hankey & Co. and possibly Société de Manutention de Djibouti). There was no showing that any of these surveyors ever held any interest in CGL or any other carrier, in any of the consignees, in any of the cargo, or in any of the other aspects of the port operations such as the stevedoring operations. In short, the Court finds that these surveyors were all "independent" surveyors within the meaning of 22 CFR § 211.9(c)(1).

While the survey reports were not as detailed as those typically issued by American cargo surveyors, the Court does not find them--with individual exceptions discussed below--to indicate a lack of trustworthiness. As the CCC itself recognizes, despite its aim and desire, it cannot always demand from these impoverished third-world nations survey reports that, through economic forces and regulation, would be considered inadequate

in more competitive and thriving ports and countries. The Court emphasizes that CGL never sought to offer any evidence of its own account of what happened to the cargo at issue in the various surveys. Further, CGL never complained at the time about the method or accuracy that any surveyor was conducting his survey. See Tr.II:58-59. Nor did it seek to cross-examine the Gellatly Hankey surveyors' supervisor who testified at trial, Mr. Aregai, about any specific survey.

In suggesting untrustworthiness of every survey report, CGL complains that certain survey reports used the phrase "said to be"; in each such instance, however, condemnation certificates corroborated the losses described in the survey report. See Claim Nos. 18-20, 23, 26, 38, 40, 51, 56; see also Claim No. 63. While CGL questions whether the surveyors actually attended the surveys, Mr. Athanassopoulos, a Waterman agent in Assab, responded that they were always present on discharge. See Athanassopoulos's Depo. at 74.

Stressing the distinction between stained cargo packaging material and damaged cargo inside, CGL argues that no award should be made where a survey report makes a notation of "stained" bags. The Court rejects the argument. First, surveyors knew how to distinguish between stained bags with good cargo on the one hand and stained bags with bad cargo on the other. See, e.g., Exh. P495. Second, these claims contain other indicia that the cargo at issue was not delivered to the consignee; for example the survey reports themselves generally contain notations that the "stained" bags at issue were left on the barge and not discharged.

CGL asserts that it is not responsible for bags torn by stevedores and thus that no notations in the survey reports for torn bags should be included for determining damages. Except for Claim No. 59, however, has CGL not established that any

tearing as to any particular claim or in general was from mishandling by the stevedores.

CGL objects to the four instances where the government is asserting a claim based on a notation in a survey report for short-landed bags. See Claim Nos. 1, 12, 59, 62. The Court agrees that, without more, the surveys should be considered untrustworthy in this narrow respect. On the one hand, none of these reports has any tally sheets attached. On the other, there was no explanation or evidence where these bags could have disappeared to from inside a containerized LASH barge. Thus, the Court does not award any amount for these four short-landing claims.

As noted in Part II below, the government has the initial burden to prove the amount of its loss. Thus, where the two surveys showed different results for the same claim, the Court used the figure that favored CGL unless other evidence such as telexes or quarantine reports substantially corroborated the report showing the higher loss.

CGL disputes that either it or its P&I club, Assurenceforeningen GARD (whom it has treated in this litigation as its agent within the cloak of its attorney-client privilege, see, e.g., Record Document No. 71 at 11), ever authorized Gellatly Hankey to perform any surveys on its behalf. Notwithstanding CGL's after-the-fact position to the contrary, contemporaneous documents from CGL and GARD imply that neither CGL nor GARD ever objected to Gellatly Hankey's performing these surveys on their behalf; at this same time that CGL requested that all invoices for the surveys be sent to and paid for by GARD, GARD recognized an on-going relationship by notifying Gellatly Hankey that it should send future survey reports and invoices to GARD. See Exhs. P589-P590; cf. Exh. P468. Further, Mr. Aregai of Gellatly Hankey and Mr. Nazareth of

CGL met several times about Gellatly Hankey's performing surveys for CGL. See Tr.III:58-59. In other words, any initial lack of authority that may have existed for Gellatly Hankey's performing surveys on CGL and GARD's behalf was cured by CGL and GARD's effective ratification and acquiesce to this arrangement. While the government called Mr. Aregai as a witness at trial, CGL never sought to cross-examine him on the government's long-maintained position that Gellatly Hankey performed these surveys on CGL's ultimate behalf as CGL's agent. Further, while CGL now objects to Gellatly Hankey's having performed certain surveys on behalf of both the carrier and the consignee, CGL introduced no evidence to show that it ever sought to have another surveyor, such as Adco, appointed to represent its interests or that Gellatly Hankey ever erred in favor of a consignee.

CGL generally objects as well to the several quarantine reports and certificates in evidence; CGL asserts that they contain no indication that any government official actually examined the cargo being condemned by the report or certificate. Using language substantially similar to the USDA infestation inspection reports relied on by CGL, see, e.g., Exh. D278 ("Barge CG-A-74 was examined . . . and found to be . . ."), all but three of the reports in evidence contain language of actual inspection and/or give reasons for the condemnation. See Exh. P54(=P529), P179, P208, P222-P223, P227-P228, P254, P277, P298. Further, two of the other reports, Exhs. P73-P74 and P283, indicate that the cargo was left for the carrier to return to the country of origin, thus at least corroborating lack of proper delivery, and the MTSC cover letter relating to the third, Exh. P283, states--as corroborated by other evidence related to that claim--that the cargo was left on the barge and not discharged.

E. The Individual Claims

By unopposed summary judgement, the Court previously dismissed twenty-three of the government's claims: Nos. 5-6, 8-9, 33-36, 41, 43, 46, 49, 52, 54, 57-58, 60, 65-66, and 71-74. At trial, the government stipulated that it was dismissing a twenty-fourth claim: No. 3. See Tr.I:125.

For many of the remaining fifty-three claims, the Court fully agrees with the government's assessment of the amount of the loss. In other instances, however, the Court does not. Below, the Court adds specific comments as to each of these remaining claims.

Claim No. 1:

As explained in Part I(D) above, the Court finds no short-landing of 8 bags.

Claim No. 2:

While the exhibits in evidence support a claim for 4649 bags, the government is asserting a claim for only 3011 bags. No speculating why the government reduced its claim (e.g., whether the government settled a claim for the remaining bags, abandoned its claim for the remaining bags, or received proof that the consignee received the remaining bags), the Court limits its award to the number of bags listed in Exh. P525.

Claim No. 4:

The Gellatly Hankey survey indicates no losses, and there is no other evidence corroborating the Afro Star survey. Thus, the Court finds no loss on this claim.

Claim No. 7:

The Court concurs in the government's assessment as to the amount of the loss.

Claim No. 10:

The Gellatly Hankey survey indicates no losses, and there is no other evidence corroborating the Afro Star survey. Thus, the Court finds no loss on this claim.

Claim No. 11:

The Gellatly Hankey survey indicates fewer losses, and there is no other evidence corroborating the larger losses in the Afro Star survey. Thus, the Court uses Gellatly Hankey's smaller loss figures.

Claim No. 12:

DSLL-540744 was diverted to Assab with the consignee's approval; thus, and as explained in Part I(D) above, the Court finds neither a shortlanding loss or an overlanding credit should be awarded for the difference in dispute. Thus, the Court finds that the loss here was limited to the six bags damaged by seawater.

Claim Nos. 13 and 14:

The Gellatly Hankey surveys indicate no losses, and there is no other evidence corroborating the Afro Star surveys. Thus, the Court finds no losses on these two claims.

Claim No. 15:

The Afro Star survey was made while the status of four of the barges was still uncertain. The two Gellatly Hankey surveys addressed the cargo losses on these additional four barges, plus the fifth barge as well; their findings are generally corroborated by the telexes and quarantine reports. The Court finds that the loss was as reported in the two Gellatly Hankey surveys: 47 bags from CG-A69, 14014 bags from CG-A44, 10 bags from CG-762, 14014 bags from CG-B53, and 10 bags from CG-939.

Claim No. 16:

The same general comments apply here as to Claim No. 15. The Court finds that the loss was as reported in the two Gellatly Hankey surveys, as corroborated by the quarantine reports: 2926 bags from CG-A44 and 2926 bags from CG-B53.

Claim No. 17:

Noting the quarantine reports and telexes corroborating the losses on only five barges, the Court finds the loss was 27,192 bags: 580 bags from DSLL-540744, 353 bags from DSLL-540701, 13,290 bags from DSLL-540804, 9218 bags from DSLL-554012, and 3751 bags from CG-586. Neither the Afro Star survey nor the telexes and quarantine reports corroborate any losses from DSLL-540855 or CG-643.

Claim Nos. 18 and 19:

The Court concurs in the government's assessment as to the amount of the loss.

Claim No. 20:

The Court concurs in the government's assessment as to the amount of the loss. While Massawa survey, Exh. P78, states without comment that 239 bags were discharged from CG-608 whereas the bill of lading states that 240 bags were loaded onto that barge, the government does not seek recovery for this one bag; in any event, the Court has discredited claims for shortlanding.

Claim No. 21:

The Court concurs in the government's assessment as to the amount of the loss with one minor adjustment. The quarantine report for DSLL-554012 states that a total of 16423 bags were condemned, whereas the two survey reports for this barge, Exhas. P81 and P83 as amended by P148 for this claim and Exh. P558 for claim no. 17, indicate a total of 16425 damaged bags from this same barge. The Court uses the lesser number from the

quarantine report and thus reduces the loss on this claim by two bags, to 21, 736 bags.

Claim Nos. 22 and 23:

The Court concurs in the government's assessment as to the amount of the loss.

Claim No. 24:

The Court concurs in the government's assessment as to the amount of the loss. From the 146 torn bags, there was a 6.992% net loss, which is roughly equivalent to a loss of 10.17 bags. Added to the seawater-damage loss of another 79 bags, the total loss equaled 89.17 bags.

Claim No. 25:

The Court concurs in the government's assessment as to the amount of the loss.

Claim No. 26:

The Gellatly Hankey survey's loss of 195 bags is corroborated by a telex, Exh. P475, and a quarantine report, Exh. P201. Thus, the Court finds the loss was 195 bags, not 196 bags as listed in the Afro Star survey.

Claim No. 27:

The Court concurs in the government's assessment as to the amount of the loss. The government does not seek recovery for, and the Court finds no loss, for the 193 bags listed as shortlanded in the Assab survey; conversely, the Court finds no credit should be given for the 200 bag overlanding in Massawa. The Court finds the total loss was the 5420 water-damaged bags from CG-972.

Claim No. 28:

The Court concurs in the government's assessment as to the amount of the loss.

Claim No. 29-32:

The government fails to take into consideration the authorized diversions of 43,792 bags in five barges (CG-614, CG-947, CG-597, CG-A70, and DSLL-540717) from Massawa to Djibouti. See Exh. D497-D500; Tr.III:35-36. In Djibouti, these bags were combined with another 25,271 bags originally destined for Djibouti. Thus, there were a total of 69,053 bags of grits sent to Djibouti on this voyage. The survey reports and other documents show damage or misdelivery for the equivalent of 11,608.17 bags (497 bags torn or loss, see Exh. P187; 5231 bags short and 973 bags torn and left, see Exh. P403; and 113.707 metric tons damaged and disposed of locally, see Exh. P403). The government has not shown that any of the 11,608.17 bags were from the five barges diverted from Assab, and not from the 25,271-bag shipment originally destined for Djibouti and for which the government is asserting no claim. Thus, the Court finds no loss for any of the cargo diverted to Djibouti.

The surveys show, and the Court finds, no cargo losses in Assab for Claim Nos. 29 and 32.

The Afro Star survey states that no bags were discharged from DSLL-540819; CGL has not shown what otherwise happened to these 759 bags in DSLL-540819 for Claim No. 30. Thus, the Court finds a loss of 759 bags for this claim. Of the 116 bags noted as damaged from CG-955, there was an ultimate shortage of 193 kilograms, which is the equivalent of around 8-1/2 bags. Thus, the Court finds a total loss of 767-1/2 bags for Claim No. 30.

The two Assab surveys for Claim No. 31 are conflicting. The Court accepted the Gellatly Hankey survey's lower figure of a 42-bag total loss; the survey states that another 500 bags were wet and rebagged, but does not indicate that there was any ultimate loss from these 500 bags. Thus, the Court finds a total loss of 42 bags for Claim No. 31.

Claim Nos. 37-38:

The Court concurs in the government's assessment as to the amount of the loss.

Claim No. 39:

The Court concurs in the government's assessment as to the amount of the loss. The two bags torn from DSLL-540170 amounted to a net one-bag loss.

Claim No. 40:

The Court concurs in the government's assessment as to the amount of the loss.

Claim No. 42:

While the exhibits in evidence support a claim for 14,250 bags, the government is asserting a claim for only 13,915 bags. As with Claim No. 2, the Court likewise limits its award to the number of bags listed in Exh. P525.

Claim No. 44:

The government failed to produce a bill of lading, a survey report, an assignment, or other essential documents for Claim No. 44. The sole documents the government appears to have produced were a certificate of seizure, Exh. P222, and a certification of destruction, Exh. P223, for 674 pails of vegetable oil; without more, however, these two are insufficient to establish even a prima facie claim. Thus, the Court finds no loss for

Claim No 44.

Claim No. 45:

The government failed to produce a survey report or other evidence that the cargo seized and condemned by the Djibouti health officials, see Exhs. D227-D228, was damaged before the cargo's discharge from CGL's barges. In other words, the government failed to show that the loss from the vessel and not thereafter. Thus, the Court awards no loss for Claim No. 45.

Claim No. 47:

The Court concurs in the government's assessment as to the amount of the loss.

Claim No. 48:

A single pail had a gross weight of 42.1 pounds, and net weight of 38-1/3 pounds. In determining a loss of 421 pounds from the 27 leaking pails, the government erroneously treated this amount as a net loss instead of as a gross loss. The Court finds the loss from these 27 pails was the equivalent of 10 pails. Thus, adding the 3 empty pails, the Court finds a total loss of 13 pails.

Claim No. 50:

The Court finds a loss of 318 bags that tore and spilled out. While the survey report indicates that another 26 bags were torn and rebagged into 13 bags, the report does not indicate whether the 13 new bags were the same sized bags (some of the cargo at issue in this case was put in 50-pound bags, and others in 50-kilogram bags); in other words, the Court has no basis to find that there was any ultimate cargo loss from these 26 bags.

Claim Nos. 51, 53, and 55:

The Court concurs in the government's assessment as to the amount of the loss.

Claim No. 56:

While it introduced various documents relating to this claim, the government did not include this claim in its summary table, Exh. P525. Thus, the Court awards nothing on this claim.

Claim No. 59:

As explained in Part I(D) above, the Court discredits the surveyor's finding of a 974 bag shortlanding. The surveyor attributed the tear and spilling of the other 1200 bags to "rough handling during . . . unloading," a condition for which CGL was not responsible. Thus, the Court awards nothing on this claim.

Claim No. 61:

The Court finds 6878 bags damaged in Assab and 2043 bags damaged in Massawa.

Claim No. 62:

The Court finds 3094 bags damaged in Assab and 119 bags damaged in Massawa. As explained in Part I(D) above, the Court discredits the surveyor's finding of a 258 bag shortlanding in Massawa.

Claim Nos. 63 and 64:

The Court concurs in the government's assessment as to the amount of the loss.

Claim No. 67:

As the government recognizes, the torn bags (22 according to Afro Star and 54 according to Gellatly Hankey) amounted to a two-bag loss after reconditioning. While the evidence appears to support another 73 bags that were spoiled by water, condemned, and left on CG-126, the government does not include these 73 additional bags on its summary table, Exh. P525; thus, the Court awards no amount for these additional 73 bags.

Claim No. 68:

The Court concurs in the government's assessment as to the amount of the loss.

Claim No. 69:

While the Afro Star survey does not list any damage to the cargo in CG-A65, the Court finds a total loss of the 15,581 bags in that barge as notated in the Gellatly Hankey survey, which is corroborated by both a quarantine report and several telexes.

Claim No. 70:

While the evidence supports a total loss of 6,512 bags (including 1,261 condemned and left on CG-593 and 25 condemned and left on CG-703), the Court limits its award to the amount listed by the government in its summary table, Exh. P525: the 5,226 bags condemned and left in CG-975.

Claim No. 75:

The Court concurs in the government's assessment as to the amount of the loss.

Claim No. 76:

While the uncorroborated Afro Star survey lists 3 pails leaking, the Court accepts the Gellatly Hankey survey's finding of just 2 pails. While the Afro Star survey does not list any damage to the cargo in CG-A31, the Court finds a total loss of the 18,893 pails in that barge as notated in the Gellatly Hankey survey, which is corroborated by both a quarantine report and several telexes. Thus, the Court finds a total loss of 18,895 pails.

II.

The United States is authorized to pursue this action on behalf of the CCC. See United States v. Fort Worth & Dallas Railway Co., 141 F. Supp. 381, 381 (N.D. Tex. 1956), aff'd, 242

F.2d 702 (5th Cir. 1957). See generally 15 U.S.C. § 714b(c).

This Court has jurisdiction over this action under U.S.C. §§ 1333(1) and 1345 and 15 U.S.C. § 714b(c). This action is an admiralty and maritime claim under F.R.Civ.P. 9(h). Because the Court has personal jurisdiction over CGL, venue in this district is proper.

By unopposed summary judgment[2] or express voluntary dismissal at trial, Claim Nos. 3, 5-6, 8-9, 33-36, 41, 43, 46, 49, 52, 54, 57-58, 60, 65-66, and 71-74 are now dismissed on the merits. Below, the Court addresses the remaining fifty-two claims.

A. Standing

The Court holds that the United States has standing to pursue each of the remaining claims except Nos. 37-40 and 44.

For those claims where the CCC was the shipper (Nos. 1-2, 18-20, and 61-64), the United States has standing irrespective of any documentary assignment from a consignee. See United States v. Central Gulf Lines, Inc., 747 F.2d 315, 317-18 (5th Cir. 1984); 22 CFR §§ 210.10(a), 211.9(c)(2)(i).

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[2]In its posttrial reply memorandum, the government asserts for the first time that the Court should vacate the unopposed summary judgment as to Claim Nos. 41, 43, 66, and 71. The Court refuses this request as too little too late. On the one hand, the government made no mention at or before trial (even though the Court had postponed the trial at the government's request so that the government could review the survey reports upon which it now relies as the sole basis for these four claims) that it would be seeking recovery for these four claims; thus, the government effectively denied CGL the opportunity to present evidence at trial on these four claims. On the other hand, the government did not introduce a bill of lading, a notice of commodity availability (for determining price), or (as may or may not be necessary depending on the terms of the bill of lading) a valid assignment for any of these four claims.

A private shipper or consignee generally has one year from date of (mis)delivery to file a timely COGSA claim. See 46 U.S.C. § 1303(6). Where as here the United States is asserting claims on behalf of the CCC, the United States is subject to the much longer six-year limitation period set forth in 15 U.S.C. § 714b(c). Cf. also 28 U.S.C. § 2415(a). If the United States obtains a claim from a private party such as through an assignment, however, the United States does not enjoy the longer limitation period if the private party's claim has become prescribed as to the private party by the time of the assignment; in other words, the government's longer limitation period cannot revive an otherwise stale claim. Cf. RTC v. International Insurance Co., _____ F. Supp. _____, _____ [Civil Action No. 89-4020, Order and Reasons of July 1, 1991, at 3-6] (E.D. La. 1991) (Carr, J.).

Noting on the one hand that the assignments for Claim Nos. 37-40, 45, 47, 48, 50, 51, and 53 are undated and on the other that the government introduced no evidence showing when it received these assignments, CGL asserts that these assignments cannot be found valid and effective. The Court disagrees. Prescription is an affirmative defense; thus, it was CGL's burden to prove, and not the government's burden to disprove, that the assignments were made more one year after (mis)delivery of the cargo at issue. Because CGL introduced no evidence on this point, the Court overrules this prescription/standing defense.

For the four claims where Save the Children Federation was the consignee (Nos. 37-40), the purported assignments from the CCC's files, Exhs. P202 and P209, are unsigned by any person, are not on Save the Children stationery, and bear no Save the Children seal or other identifying mark. While the Court does not dispute that these exhibits are what came from the CCC's files, these unexecuted documents themselves alone do not constitute valid assignments. Thus, finding that the government

lacks standing to pursue Claim Nos. 37-40, the Court awards nothing on these four claims.

For Claim No. 44, the government has introduced neither a document purporting to constitute an assignment nor a bill of lading or other document showing that the CCC was the shipper. Thus, finding that the government lacks standing to pursue this claim, the Court similarly awards nothing on this claim.

For all the remaining claims--namely, those where the consignee was either Catholic Relief Services (Nos. 4, 7, 10-17, 23-32, 42, 55-56, 59, 67-70, and 75-76) or World Vision Relief Organization (Nos. 21-22, 45, 47-48 50-51, and 53)--the government has produced written assignments, the authenticity of which CGL does not contest. The Court holds that the government has standing to pursue these thirty-eight claims.

B. Evidentiary Rulings

The Court finds that Gellatly Hankey was acting as CGL's agent for those surveys purporting to be made at the request of GARD. Thus, these surveys are all admissible under F.R.Ev. 801(d)(1)(D) as admissions by a party-opponent. See United States v. Lykes Bros. Steamship Co., 432 F.2d 1076, 1078 (5th Cir. 1970).

The Court finds that, with the few exceptions noted in Part I(E) above, the surveys on behalf of the consignee or the CCC were made within personal knowledge, were prepared pursuant to 22 CFR § 211.9(c)(1), and do not indicate lack of trustworthiness and thus are admissible under F.R.Ev. 803(8)(C). Cf. Central Gulf Lines, 747 F.2d at 319-20. In those few noted exceptions, the Court placed no weight on the survey in question.

While the surveyors never provided "stroke tallies" or only occasionally provided other tally sheets, the Court does not find this omission particularly crucial here, where the Court makes no awards for shortlanding.

CGL's interpretation of 22 CFR § 211.9(c)(1) is generally misplaced. This regulation is not a rule of evidence that wholly governs the admissibility of documents in this case. Nor as its qualifying language throughout emphasizes, is it wholly compulsory on a consignee in every respect. See also 22 CFR § 211.12. Contrary to CGL's interpretation, the regulation does not require a joint survey by different surveyors representing different interests. Instead, perhaps already cognizant of the fewer commercial options in the poorer third-world nations where relief cargo is generally sent, the regulation prefers that the cargo examination be "conducted jointly by the surveyor, the consignee, and the ocean carrier"; using the word surveyor in the singular, the regulation merely requires that the surveyor not have a monetary interest in the cargo and in any party to the shipment; the persons with whom the surveyor should examine the cargo "[i]f practicable" are, according to the regulation, the carrier and the consignee.

The government quarantine reports are admissible under F.R.Ev. 803(8)(C) under the same rationale and similar findings of trustworthiness. CGL seeks to distinguish these government reports from a surveyor's report on the ground that the CCC cannot compel a foreign public health official to issue a quarantine report even if one should under the facts be issued. But this same argument applies equally to the independent surveyors; the CCC is just as powerless to compel any independent surveyors in a foreign country to perform a survey in any particular manner. In short, CGL addresses the wrong issue. To quote: "the duty to prepare the report can be delegated, under government regulations, to an independent agency or to a foreign government without the report losing its character, when submitted through the appropriate United States agency, as a report of a ["public offic[e] or agenc[y]"]." Compare Lykes Bros., 432 F.2d at 1079-80 with Central Gulf Lines, 742 F.2d at 319-20.

C. COGSA

The governing substantive law is the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315. COGSA requires the carrier to use due diligence to make its ship seaworthy, to properly "man, equip, and supply the ship," and to properly keep and care for the cargo. 46 U.S.C. § 1303. These duties of the carrier are non-delegable. Agrico Chemical Co. v. S/S Atlantic Forest, 620 F.2d 487, 489 (5th Cir. 1980). These COGSA obligations apply both to the mother vessel and to each individual LASH barge. See Wirth, Ltd. v. S/S Acadia Forest, 537 F.2d 1272 (5th Cir. 1976). The burden of proof under COGSA is well-established:

> The plaintiff establishes a prima facie case by proving that the cargo for which the bill of lading issued was loaded in an undamaged condition, and discharged in a contaminated condition. ... Once the plaintiff has presented a prima facie case, the carrier then has the burden of proving that it exercised due diligence to prevent the damage or that the harm was occasioned by one of the excepted clauses delineated in 46 U.S.C. § 1304(2). ... If the carrier rebuts the plaintiff's prima facie case with proof of an excepted cause listed in ... 46 U.S.C. § 1304(2)(a)-(p), the burden returns to the plaintiff to establish that the carrier's negligence contributed to the damage or loss. If the plaintiff is then able to establish that the carrier's negligence was a contributory cause of the damage, the burden ships to the carrier to segregate the portion of the damage due to the excepted cause from that portion resulting from [the carrier's] own negligence. In addition to rebuttal of the prima facie case by proof of one of the specific exception causes of cargo damage,

> 46 U.S.C. § 1304(2)(a)-(p), the carrier may also rebut the prima facie case by relying on the catch-all exception in § 1304(2)(q) of COGSA, which provides that the carrier may exonerate himself ... by proving that the loss or damage occurred without the actual fault and privity of the carrier ... . 46 U.S.C. § 1304(2)(q). The carrier's burden of establishing his own freedom from contributing fault ... is no mere burden of going forward with evidence, but a real burden of persuasion, with the attendant risk of nonpersuasion. Consequently, the burden of proof does not return to the plaintiff, but rather judgment must hinge upon the adequacy of the carrier's proof that he was free from any fault whatsoever contributing to the damage of the goods entrusted to his carrier.

Quaker Oats Co. v. M/V Torvanger, 734 f.2d 238, 240-41 (5th Cir. 1984), cert. denied, 469 U.S. 1189, 105 S. Ct. 959, 83 L.Ed.2d 965 (1985).

In the pretrial order, the parties stipulated that all cargo was delivered in good order. The Court holds that the government failed to establish a prima facie case for ten of the remaining claims (Nos. 1, 4, 10, 13-14, 29, 32, 45, 56, and 59). For the other thirty-seven claims (Nos. 2, 7, 11-12, 15-28, 30-31, 42, 47-48, 50-51, 53, 55, 61-64, 67-70, and 75-76), the Court holds that the government established a prima facie case through proof of short or bad delivery and that CGL failed to rebut this prima facie showing (either through proof of its freedom of contributing fault so as to come within the (q) clause or through other proof to come within any of the other excepting clauses).

Contrary to CGL's position, it, and not the government, bore the burden of proof on the cause of any loss. Not only does

the Court find that CGL was negligent in its handling of the entire operation (by not providing adequate fleeting equipment and barges necessary to satisfy CGL's duty to provide seaworthy barges), but also the Court finds that CGL failed to prove that the damage or loss to any particular claim was the fault of someone other than CGL.

The Court must reject CGL's attempt to pass the blame on the port authorities in Assab (CGL does not even assert, and certainly did not prove, that the other port authorities did anything wrong). On the one hand, CGL did not show that it satisfied its duty to provide seaworthy barges; the Court emphasizes again that the decision to use LASH barges and to drop a limited number of buoys was CGL's alone. On the other, CGL did not show that the Assab port authorities proximately caused any particular cargo damage. In short, the Court finds that CGL relinquished neither full control nor (as is especially important here) full responsibility for its barges once they were offloaded from their mother ship. A carrier cannot exonerate itself for governmental port actions in handling its LASH barges if it does not provide a seaworthy LASH barge and fleeting equipment for the port authorities to handle. In sum, unlike the carrier in Tapco Nigeria, ltd. v. M/V Westwind, 702 F.2d 1252 (5th Cir. 1983), CGL did not do all that it reasonably could do within the limitations of the law, custom, and usage of Assab.

Had the consignees or the United States sought reimbursement from CGL for late discharge of the cargo from the barges, then CGL would probably have a valid defense. But that is not today's case.

D. Interest

The Court finds no peculiar circumstances for not awarding prejudgment interest in this maritime action. See Central Gulf Lines, 747 F.2d at 320.

In its broad discretion, the Court determines that interest should run from June 1, 1986, which the approximate date when the last of the cargo was to have been delivered. While most of the cargo loss occurred before then, there was no deadline for delivering the cargo and the United States sought and obtained a delay in commencing this action, see Exh. P409.

Adhering to its general practice, the Court holds that this interest should run at the rate and method provided for in 28 U.S.C. § 1961. See, e.g., Pillsbury Co. v. Midland Enterprises, Inc., 715 F. Supp. 738, 770-71 (E.D. La. 1989) (Carr, J.), aff'd, 904 F.2d 317 (5th Cir.), cert. denied, _____ U.S. _____, 111 S. Ct. 515, 112 L.Ed.2d 527 (1990).

III.

For these reasons, the Court awards judgment in favor of the United States and against Central Gulf Lines, Inc. for the principal amount of $3,092,344.51; plus interest, from June 1, 1986 until paid, at the rate provided for in 28 U.S.C. § 1961; plus costs of court. Further, the Court dismisses without prejudice for lack of in rem jurisdiction the claims against the two defendant vessel. The Court shall forthwith enter judgment accordingly.

New Orleans, Louisiana, this 27th day of August, 1991.

(Signed)
UNITED STATES DISTRICT JUDGE

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Appendix "A"
Summary of Amount Awarded on each claim

Schedule A Number	Voyage	Bill of Lading	Commodity
1.	D/M 2	PBluff/PSudan 1	nonfat dry milk
2.	D/M 2	Helena/PSudan 1	nonfat dry milk
3.	voluntarily dismissed at trial		
4.	D/M 6	Pensac./Assab 2	nonfat dry milk
5.	dismissed on unopposed summary judgment		
6.	dismissed on unopposed summary judgment		
7.	D/M 6	PBluff/Massawa 1	nonfat dry milk
8.	dismissed on unopposed summary judgment		
9.	dismissed on unopposed summary judgment		
10.	D/M 6	NOrleans/Assab 1	pinto beans
11.	D/M 6	NOrleans/Assab 2	bulgur wheat
12.	D/M 6	Houston/Massawa 1	bulgur wheat
13.	D/M 6	Houston/Assab 2	bulgur wheat
14.	D/M 6	Lk.Chas./Assab 2	bulgur wheat
15.	D/M 3	Pensac./Assab 1	bulgur wheat
16.	D/M 3	Pensac./Assab 2	corn soya milk
17.	D/M 3	Galveston/Assab 2	bulgur wheat
18.	D/M 6	corpus C./Assab 1	all purpose flour
19.	D/M 6	Lk.Chas./Assab 1	all purpose flour
20.	D/M 6	Galveston/Assab 2	all purpose flour
21.	D/M 3	Galveston/Assab 1	bulgur wheat
22.	D/M 3	Corpus C./Assab 2	bulgur wheat
23.	D/M 4	Pensac./Assab 1	fort. sorghum grits
24.	D/M 4	Pensac./Massawa 2	fort. sorghum grits
25.	D/M 4	PBluff/Massawa 1	bulgur wheat
26.	D/M 4	PBluff/Assab 1	bulgur wheat
27.	D/M 4	PBluff/Djibouti 1	nonfat dry milk
28.	D/M 4	Galveston/Assab 1	bulgur wheat
29.	D/M 4	Galveston/Mswa. 4	fort. sorghum grits
30.	D/M 4	Galveston/Mswa. 1	fort. sorghum grits

Appendix "A" (cont'd)
Summary of Amount Awarded on each claim

C&F Price (in cents)	Net Loss (in pounds)	Dollar Value of Loss
34.0654	0	$0.00
34.0654	150,550	51,285.43
33.4250	0	0.00
33.4385	24,300	8,125.56
31.6088	0	0.00
15.8303	6,283.11	994.63
15.7988	661.38	104.49
15.7988	0	0.00
15.8303	0	0.00
16.5859	1,404,750	232,990.88
21.3184	292,600	62,377.62
16.7116	1,359,600	227,211.59
15.4141	850,755.14	131,135.91
15.4064	72,972.26	11,242.39
15.4697	1,086,537.11	168,084.24
16.7127	1,086,800	181,634.05
16.2622	1,124,700	182,900.93
15.5461	841,450	130,812.39
16.9411	4,458.533	755.32
15.4742	133,929.45	20,724.45
15.4742	21,494.85	3,326.15
33.5453	271,000	90,916.83
15.5989	63,933.40	9,972.88
15.8789	0	0.00
16.8584	38,375.49	6,469.49

Appendix "A" (cont'd)
Summary of Amount Awarded on each claim

Schedule A Number	Voyage	Bill of Lading	Commodity
31.	D/M 4	PBluff/PSudan 1	nonfat dry milk
32.	D/M 4	Galveston/Mswa. 2	fort. sorghum grits
33.	dismissed on unopposed summary judgment		
34.	dismissed on unopposed summary judgment		
35.	dismissed on unopposed summary judgment		
36.	dismissed on unopposed summary judgment		
~~37.~~	~~D/M 6~~	~~NOrleans/Assab 1~~	~~bulgur wheat~~
~~38.~~	~~D/M 4~~	~~NOrleans/Assab 1~~	~~bulgur wheat~~
~~39.~~	~~D/M 4~~	~~NOrleans/Assab 1~~	~~bulgur wheat~~
~~40.~~	~~D/M 5~~	~~Lk.Chas./Assab 1~~	~~red winter wheat~~
41.	dismissed on unopposed summary judgment		
42.	D/M 5	Houston/Assab 2	nonfat dry milk
43.	dismissed on unopposed summary judgment		
44.	D/M 5	Savannah/Djib. 1	vegetable oil
45.	D/M 5	Houston/Djib. 1	nonfat dry milk
46.	dismissed on unopposed summary judgment		
47.	D/M 5	Lk.Chas./Mswa. 1	bulgur wheat
48.	D/M 5	Savannah/Mswa. 1	vegetable oil
49.	dismissed on unopposed summary judgment		
50.	D/M 5	Pensacola/Mswa. 1	corn soya milk
51.	D/M 5	Corpus C./Assab 1	corn soya milk
52.	dismissed on unopposed summary judgment		
53.	D/M 5	Corpus C./Djib 1	bulgur wheat
54.	dismissed on unopposed summary judgment		
55.	G/H 28	Corpus C./Assab 1	bulgur wheat
56.	G/H 28	Pensacola/Mswa. 1	bulgur wheat
57.	dismissed on unopposed summary judgment		
58.	dismissed on unopposed summary judgment		
59.	G/H 28	Beaumont/Djib. 4	fort. sorghum grits
60.	dismissed on unopposed summary judgment		

Appendix "A" (cont'd)
Summary of Amount Awarded on each claim

C&F Price (in cents)	Net Loss (in pounds)	Dollar Value of Loss
34.0654	2,100	353.58
17.0672	0	0.00
~~15.5197~~	~~5,511.50~~	~~855.37~~
~~15.5189~~	~~804,127.85~~	~~124,791.41~~
~~15.5189~~	~~793,766.23~~	~~123,183.41~~
~~13.1299~~	~~821,544.19~~	~~107,868.26~~
33.5430	695,750	233,375.16
?????	0	0.00
33.5754	0	0.00
16.4119	84,987.33	13,948.00
37.9980	498.333	189.36
19.5684	15,900	3,111.37
20.5517	695,750	142,988.43
16.6128	890,989.09	148,017.81
15.8038	140,500	22,204.39
16.1390	0	0.00
16.1829	0	0.00

Appendix "A" (cont'd)
Summary of Amount Awarded on each claim

Schedule A Number	Voyage	Bill of Lading	Commodity
61.	G/H 28	Pensacola/Assab 2	corn soya milk
62.	G/H 28	Pensacola/Assab 1	corn soya milk
63.	G/H 30	Galveston/Mswa. 1	all purpose flour
64.	G/H 30	Corpus C./Assab 1	bulk red wheat
65.	dismissed on unopposed summary judgment		
66.	dismissed on unopposed summary judgment		
67.	G/H 30	Galveston/Assab 1	bulgur wheat
68.	G/H 30	Corpus C./Mswa. 1	bulgur wheat
69.	G/H 30	Corpus C./Assab 4	bulgur wheat
70.	G/H 30	Corpus C./Assab 2	bulgur wheat
71.	dismissed on unopposed summary judgment		
72.	dismissed on unopposed summary judgment		
73.	dismissed on unopposed summary judgment		
74.	dismissed on unopposed summary judgment		
75.	G/H 30	NOrleans/Mswa. 1	soybean salad oil
76.	G/H 30	NOrleans/Assab 1	soybean salad oil

Appendix "A" (cont'd)
Summary of Amount Awarded on each claim

C&F Price (in cents)	Net Loss (in pounds)	Dollar Value of Loss
21.0420	446,050	93,857.68
21.1131	160,650	34,064.97
15.2831	817,350	124,916.65
11.0412	867,424.12	95,774.43
16.6511	100	16.65
16.2027	87,500	14,177.34
16.2032	1,285,200	208,243.11
16.2032	261,300	42,338.88
52.5707	92.4	48.58
54.1135	727,457.5	393,652.88
	GRAND TOTAL =	$3,092,344.51

Appendix "B"
Exhibits Relating to Individual Claims

Claim No. 1:

Bill of Lading:	P7
Unit Cargo Price:	P5 (for No. 2, same commodity and shipment)
Assignment:	None
Surveyor Reports:	Geriza Trade: P8
Demand Letters:	None
Quarantine/Health Documents:	None
Other Documents:	P1, P2, P6

Claim No. 2:

Bill of Lading:	P3-P4
Unit Cargo Price:	P5
Assignment:	None
Surveyor Reports:	Geriza Trade: P8
Demand Letters:	None
Quarantine/Health Documents:	None
Other Documents:	P1, P2, P6

Claim No 4:

Bill of Lading:	P22
Unit Cargo Price:	P5 (for No. 2, same commodity); calculation from shipper's declared value on the bill of lading. The exhibit listed by the government, P23, shows the 5¢/bag price of the packaging material.
Assignment:	P37
Surveyor Reports:	Afro Star: P27 Gellatly Hankey: P580
Demand Letters:	P35-36
Quarantine/Health Documents:	None
Other Documents:	None

Appendix "B"
Exhibits Relating to Individual Claims

Claim No. 7:

Bill of Lading:	P13
Unit Cargo Price:	P5 (for No. 2, same commodity); calculation from shipper's declared value on the bill of lading. The exhibit listed by the government, P14, shows the 5¢/bag price of the packaging material.
Assignment:	P37
Surveyor Reports:	Afro Star: P28
Demand Letters:	P35-36
Quarantine/Health Documents:	None
Other Documents:	None

Claim No. 10

Bill of Lading:	P9
Unit Cargo Price:	P10
Assignment:	P37
Surveyor Reports:	Afro Star: P29 Gellatly Hankey: P572
Demand Letters:	P35-P36
Quarantine/Health Documents:	None
Other Documents:	None

Claim No. 11:

Bill of Lading:	P11
Unit Cargo Price:	P12
Assignment:	P37
Surveyor Reports:	Afro Star: P30 Gellatly Hankey: P575
Demand Letters:	P35-P36
Quarantine/Health Documents:	P73-P74
Other Documents:	None

Appendix "B"
Exhibits Relating to Individual Claims

Claim No. 12:

Bill of Lading:	P15
Unit Cargo Price:	P16, P25
Assignment:	P37
Surveyor Reports:	Afro Star: P31-P32
	Gellatly Hankey: (P78)
Demand Letters:	P35-P36
Quarantine/Health Documents:	None
Other Documents:	D310

Claim No. 13:

Bill of Lading:	P24
Unit Cargo Price:	P16, P25
Assignment:	P37
Surveyor Reports:	Afro Star: P33
	Gellatly Hankey:P584
Demand Letters:	P35-P36
Quarantine/Health Documents:	None
Other Documents:	None

Claim No. 14:

Bill of Lading:	P17
Unit Cargo Price:	P18
Assignment:	P37
Surveyor Reports:	Afro Star: P34
	Gellatly Hankey: P574
Demand Letters:	P35-P36
Quarantine/Health Documents:	None
Other Documents:	None

Appendix "B"
Exhibits Relating to Individual Claims

Claim No. 15:

Bill of Lading:	P38, P40
Unit Cargo Price:	P41
Assignment:	P53
Surveyor Reports:	Afro Star: P48 Gellatly Hankey: P491, P563
Demand Letters:	P51-P52
Quarantine/Health Documents:	P54-P55, P146, P529
Other Documents:	P376, P456, P463, P468, P475, P478, P532

Claim No. 16:

Bill of Lading:	P43
Unit Cargo Price:	P44
Assignment:	P53
Surveyor Reports:	Afro Star: P49 Gellatly Hankey: P492, P561
Demand Letters:	P51-P52
Quarantine/Health Documents:	P54, P56, P146, P529
Other Documents:	P376, P456, P463, P468, P475, P478, P532

Appendix "B"
Exhibits Relating to Individual Claims

Claim No. 17:

Bill of Lading:	P45
Unit Cargo Price:	Calculated from shipper's declared value on the bill of lading.
Assignment:	P53
Surveyor Reports:	Afro Star: P50 Gellatly Hankey: P558
Demand Letters:	P51-P52
Quarantine/Health Documents:	P146
Other Documents:	P82, P376, P456, P463, P467-P468, P475, P478, P532

Claim No. 18:

Bill of Lading:	P57
Unit Cargo Price:	P58
Assignment:	P586
Surveyor Reports:	Gellatly Hankey: P61, P505
Demand Letters:	P75-P76
Quarantine/Health Documents:	P73-P74
Other Documents:	None

Claim No. 19:

Bill of Lading:	P62
Unit Cargo Price:	P63
Assignment:	P586
Surveyor Reports:	Gellatly Hankey: P66, P504
Demand Letters:	P75-P76
Quarantine/Health Documents:	P73-P74
Other Documents:	None

Appendix "B"
Exhibits Relating to Individual Claims

Claim No. 20:

Bill of Lading:	P67
Unit Cargo Price:	P68
Assignment:	P586
Surveyor Reports:	Gellatly Hankey: P72, P77-P78, P506
Demand Letters:	P75
Quarantine/Health Documents:	P73-P74
Other Documents:	None

Claim No. 21:

Bill of Lading:	P79, P139
Unit Cargo Price:	P80, P140
Assignment:	P153
Surveyor Reports:	Gellatly Hankey: P81, P83, P92-P95, P148
Demand Letters:	P149-P150
Quarantine/Health Documents:	P145-P146
Other Documents:	P82, P376, P456, P463, P468, P475, P478, P532

Claim No. 22:

Bill of Lading:	P143
Unit Cargo Price:	P144
Assignment:	P153
Surveyor Reports:	Gellatly Hankey: P85-P91, P96-P138, P141-P142, P147, P557
Demand Letters:	P149-P150
Quarantine/Health Documents:	P146
Other Documents:	P82, P376, P446, P456, P463, P465, P467-P468, P472, P475, P478, P532

Appendix "B"
Exhibits Relating to Individual Claims

Claim No. 23:

Bill of Lading:	P154
Unit Cargo Price;	P155
Assignment:	P186
Surveyor Reports:	Afro Star: P174
	Gellatly Hankey: P494
Demand Letters:	P189
Quarantine/Health Documents:	P201
Other Documents:	P376, P463, P465, P468, P475, P478, P532

Claim No. 24:

Bill of Lading:	P156
Unit Cargo Price:	P157
Assignment:	P186
Surveyor Reports:	Afro Star: P175
Demand Letters;	P189
Quarantine/Health Documents:	None
Other Documents:	P472

Claim No. 25:

Bill of Lading:	P158
Unit Cargo Price:	P159
Assignment:	P186
Surveyor Reports:	Afro Star: P176
	Gellatly Hankey: P495
Demand Letters:	P189
Quarantine/Health Documents:	None
Other Documents:	P472

Appendix "B"
Exhibits Relating to Individual Claims

Claim No 26:

Bill of Lading:	P160
Unit Cargo Price:	P159, P161
Assignment:	P186
Surveyor Reports:	Afro Star: P177 Gellatly Hankey: P493
Demand Letters:	P189
Quarantine/Health Documents:	P201, P208
Other Documents:	P472, P475

Claim No. 37:

Bill of Lading:	P191
Unit Cargo Price:	P190, P192
Assignment:	P202
Surveyor Reports:	Gellatly Hankey: P193, P496
Demand Letters:	P203
Quarantine/Health Documents:	P201
Other Documents:	P465, P472

Claim No. 38:

Bill of Lading:	P194
Unit Cargo Price:	P195-P196
Assignment:	P202
Surveyor Reports:	Gellatly Hankey: P197, P497
Demand Letters:	P203
Quarantine/Health Documents:	P201
Other Documents:	P376, P463, P465, P472, P475, P478, P532

Appendix "B"
Exhibits Relating to Individual Claims

Claim No. 39:

Bill of Lading:	P198
Unit Cargo Price:	P199-P200
Assignment:	P202
Surveyor Reports:	Gellatly Hankey: P498, P587
Demand Letters:	P203
Quarantine Documents:	P201
Other Documents:	P463, P465, P472, P475, P478, P532

Claim No. 55:

Bill of Lading:	P251
Unit Cargo Price:	P252
Assignment:	P264
Surveyor Reports:	Gellatly Hankey: P253, P520
Demand Letters:	P262-P263, P265
Quarantine/Health Documents:	P254
Other Documents:	P433

Claim No. 56:

Bill of Lading:	P255
Unit Cargo Price:	P256
Assignment:	P264
Surveyor Reports:	Gellatly Hankey: P257, P512
Demand Letters:	P262-P263, P265
Quarantine/Health Documents:	None
Other Documents:	None

Appendix "B"
Exhibits Relating to Individual Claims

Claim No. 59:

Bill of Lading:	P258
Unit Cargo Price:	P259
Assignment:	P264
Surveyor Reports:	Gellatly Hankey: P260 Mitchell Cotts: P261
Demand Letters:	P252-P263, P265
Quarantine/Health Documents:	None
Other Documents:	None

Claim No. 61:

Bill of Lading:	P267
Unit Cargo Price:	P268
Assignment:	None
Surveyor Reports:	Gellatly Hankey: P273, P275, P512, P517
Demand Letters:	P278
Quarantine/Health Documents:	(P277)
Other Documents:	P266, P486, D114, D155-D156

Claim No. 62:

Bill of Lading:	P270
Unit Cargo Price:	P271
Assignment:	None
Surveyor Reports:	Gellatly Hankey: P274, P276, P512, P518
Demand Letters:	P278
Quarantine/Health Documents:	(P277)
Other Documents:	P266, P486, P433, D114, D155-D156

Appendix "B"

Exhibits Relating to Individual Claims

Claim No. 63:

Bill of Lading:	P280
Unit Cargo Price:	P281, P292
Assignment:	P291
Surveyor Reports:	Gellatly Hankey: P508
Demand Letters:	P292
Quarantine/Health Documents:	P283
Other Documents:	P282, P285, P456-P457

Claim No. 64:

Bill of Lading:	P286
Unit Cargo Price:	P287
Assignment:	P291
Surveyor Reports:	Gellatly Hankey: P290, P509
Demand Letters:	P292
Quarantine/Health Documents:	P289
Other Documents:	P288, P456, P463, P475, P[illegible], P487

Claim No. 67:

Bill of Lading:	P293
Unit Cargo Price:	P294
Assignment:	P315
Surveyor Reports:	Afro Star: P295, P313 Gellatly Hankey: P523
Demand Letters:	P314, P316
Quarantine/Health Documents:	P289
Other Documents:	P457

Appendix "B"
Exhibits Relating to Individual Claims

Claim No. 68:

Bill of Lading:	P296
Unit Cargo Price:	P297
Assignment:	P315
Surveyor Reports:	Afro Star: P299
	Gellatly Hankey: P510
Demand Letters;	P314, P316
Quarantine/Health Documents:	P298
Other Documents:	None

Claim No. 69:

Bill of Lading:	P300
Unit Cargo Price:	P301
Assignment:	P315
Surveyor Reports:	Afro Star: P302, P313
	Gellatly Hankey: P507
Demand Letters:	P314, P316
Quarantine/Health Documents:	P289
Other Documents:	P376, P441, P443, P456, P463, P468, P475, P478

Claim No. 70:

Bill of Lading:	P303
Unit Cargo Price:	P304
Assignment:	P315
Surveyor Reports:	Afro Star: P305, P313
	Gellatly Hankey: P513, P521
Demand Letters:	P314, P316
Quarantine/Health Documents:	P289
Other Documents:	None

Appendix "B"
Exhibits Relating to Individual Claims

Claim No. 75:

Bill of Lading:	P306
Unit Cargo Price:	P307
Assignment:	P315
Surveyor Reports:	Afro Star: P308-P309
Demand Letters:	P314, P316
Quarantine/Health Documents:	None
Other Documents:	None

Claim No. 76:

Bill of Lading:	P310
Unit Cargo Price:	P311
Assignment:	P315
Surveyor Reports:	Afro Star: P312-P313 Gellatly Hankey: P489
Demand Letters:	P314, P316
Quarantine/Health Documents:	P289
Other Documents:	P376, P446, P456, P463, P468, P475, P478

D-1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	Civil Action
VERSUS	No. 88-4505
CENTRAL GULF LINES, INC., ET AL	Section "J"

JUDGMENT

Considering the Court's Opinion in this action,

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that there is judgment in favor of the United States of America and against the defendant Central Gulf Lines, Inc. in the principal amount of $3,092,344.51; plus interest, from June 1, 1986 until paid, at the rate provided for in 28 U.S.C. § 1961; plus costs of court.

IT IS HEREBY FURTHER ADJUDGED, ORDERED, AND DECREED that there is judgment against the United States of America and in favor of the defendant M/V DELTA MAR, its engines, etc., in rem and in favor of the defendant M/V GREEN HARBOUR, its engines, etc., in rem, dismissing without prejudice for lack of in rem jurisdiction all claims against these two defendants.

New Orleans, Louisian, this 27 day of August, 1991.

[S] PATRICK E. CARR
UNITED STATES DISTRICT JUDGE

ph
Date of Entry August 28, 1991

MINUTE ENTRY
September 25, 1991
CARR, J.

UNITED STATES OF AMERICA	Civil Action
VERSUS	No. 88-4505
CENTRAL GULF LINES, INC., ET AL	Section "J"

This matter is before the court on plaintiff's Motion to Amend the Judgment or alternatively to Reopen the Record. The Court has determined in its discretion that oral argument is unnecessary. As such, the Court now CANCELS the hearing previously scheduled for September 25, 1991.

The purpose of a Motion to Amend a Judgment under the Federal Rules of Civil Procedure is to "correct manifest errors of law or fact or, in some limited situations, to present newly discover evidence." Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1219 (5th Cir. 1986). In viewing the trial record, the Court finds that no manifest error was committed. [1]

Regarding the purported assignments, the plaintiff offered two exhibits which contained no dates, no signatures, and no identifying marks. The exhibits were a standard form containing blanks with information filled in. No testimony was offered to state who or when the blanks were filled in. The testimony that was offered only stated a conclusion that they were valid assignments. There was no evidence, testimonial or documentary, from

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[1] The plaintiff's exhibits in support of this motion were not consider because they did not constitute newly discovered evidence. See, Fontenot, 791 F.2d at 1219-1220.

Date of Entry September 25, 1991

a Save The Children Federation representative showing an intent to assign claims to the plaintiff.[2] Thus, the Court did not commit manifest error in holding that the plaintiff lacked valid assignments.

Nor does the Court commit manifest error in finding that the plaintiff lacks standing absent valid assignments. The Court does not dispute that the plaintiff may have some interest in the claims. However, absent a valid assignment this interest does not rise to a level of standing when the plaintiff did not retain title to the cargo or book its shipment. For instance, if the plaintiff had booked shipment, then there would be standing. See, 22 C.F.R. §211.9(c)(2). On the other hand, when the plaintiff does not book shipment and the claim is not assigned, the plaintiff then can recover against the nongovernment sponsor. 22 C.F.R. §211.9(c)(ii)(G). Thus, the Court did not commit manifest error in concluding that the plaintiff lacked standing on the claims.

Therefore, for the above reasons, the plaintiff's Motion To Amend the Judgment is DENIED.

Lastly, reopening the record in this case would not be proper. It is undisputed that any evidence offered at a reopening would be evidence that was available to the plantiff at trial. As such, plaintiff's alternative Motion to Reopen the Record is also DENIED.

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[2] An essential element of a valid assignment is the intention of the parties involved to create such relationship. 6 American Jurisprudence 2d Assignments §82 at 263.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	Civil Action
VERSUS	No. 88-4505
CENTRAL GULF LINES, INC., in personam, and the SS DELTA MAR and the SS GREEN HARBOUR, their engines, tackle, etc., in rem	Section "J" Judge Carr

ORDER

In accordance with the Court's minute entry of September 25, 1991, it is hereby ORDERED that the Motion of the United States to amend the judgment and, in the alternative, to reopen the record is DENIED.

Dated this 10 day of October, 1991.

[S] PATRICK E. CARR
UNITED STATES DISTRICT JUDGE

28 U.S.C. § 1251. Original Jurisdiction

(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

28 U.S.C. § 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

46 U.S.C. § 1300. Bills of lading subject to chapter

Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter.

46 U.S.C. § 1301. Definitions

When used in this chapter –

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shiper.

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) The term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) The term "ship" means any vessel used for the carriage of goods by sea.

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

46 U.S.C. § 1302. Duties and rights of carrier

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and

discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title.

46 U.S.C. § 1303. Responsibilities and liabilities of carrier and ship

Seaworthiness

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to–

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

Cargo

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

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Notice of loss or damage; limitation of actions

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

***

46 U.S.C. § 1304. Rights and immunities of carrier and ship

Unseaworthiness

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from –

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidehnts of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

***

22 C.F.R. § 211.9(c)(1)(i)

(c) Ocean carrier loss and damage. - (1) Survey and outturn reports. (i) Cooperating sponsors shall arrange for an independent cargo surveyor to attend the discharge of the cargo and to count or weigh the cargo and examine its condition, unless the USAID or Diplomatic Post determines that such examination is not feasible, or if CCC has made other provision for such examinations and reports. The surveyor shall prepare a report of its findings showing the quantity and condition of the commodities discharged. The report shall also show the probable cause of any damage noted, and set forth the time and place when the examination was made. If practicable, the examination of the cargo shall be conducted jointly by the surveyor, the consignee, and the ocean carrier, and the survey report shall be signed by all parties. Customs receipts, port authority reports, shortlanding certificates, cargo boat notes, stevedore's tallies, etc., where applicable, shall be obtained and furnished with the report of the surveyor. The cooperating sponsor shall obtain a certification by a public health official or similar competent authority as to

(A) the condition of the commodity in any case where a damaged commodity appears to be unfit for its intended use; and

(B) a certificate of disposition in the event the commodity is determined to be unfit for its intended use. Such certificates shall be obtained as soon as possible after discharge of the cargo. In any case where the cooperating sponsor can provide a narrative chronology or other commentary to assist in the adjudication of ocean transportation claims, such information should be forwarded as described below. Cooperating sponsors shall prepare such a statement in any case where the loss is estimated to be in excess of $5,000. All documentation shall be in English or supported by an English translation and shall be forwarded as set forth in paragraph (c)(1) (iii) and (iv) of this section. Such cost of an English translation shall be incorporated into the survey

fee. The cooperating sponsor may, at its option, also engage the independent surveyor to supervise clearance and delivery of the cargo from customs or port areas to the cooperating sponsor or its agent and to issue delivery survey reports thereon.

Fed. R. Civ. P. 32(a)

Rule 32. Use of Depositions in Court Proceedings

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the

witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action has been brought in any court of the United States or of any State and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Federal Rules of Evidence.

Fed. R. Civ. P.52(a)

Rule 52. Findings by the Court [Effective until Dec. 1, 1991.]

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if

the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Fed. R. Evid. 201

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Fed. R. Evid. 801(d)(2)(D)

Rule 801. Definitions

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(d) Statements which are not hearsay. A statement is not hearsay if --

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(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Fed. R. Evid. 802

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Fed. R. Evid. 803(8)(C)

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

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(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or

agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed. R. Evid. 901

Rule 901. Requirement of Authentication or Identification

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

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Fed. R. Evid. 902(3)

Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

***

(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose

certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

ANALYSIS OF SURVEYS WHICH SHOW LACK OF EVIDENCE TO SUPPORT FACT FINDINGS

Claim No.	Cargo	Amount Awarded	Survey Report
2	Non-Fat Dry Milk	$ 51,285	4,629 Water Damaged Bags
7	Same	$ 8,125	486 Seawater Spoiled Bags
11	Bulgur Wheat	$ 995	57 Stained Bags
12	Same	$ 104	6 Seawater Spoiled Bags
15	Same	$232,990	28,028 Stained Bags
16	Corn Soya Milk	$ 62,377	5,852 Bags Condition not ascertained
17	Bulgur Wheat	$227,211	27,192 Stained Bags
18	Flour	$131,135	7,718 Stained Bags

ANALYSIS OF SURVEYS WHICH SHOW LACK OF EVIDENCE TO SUPPORT FACT FINDINGS

Defect in Survey	Evidence in Support of Cargo Claim
Supplemental Report Scheduled But Never Issued	None (P-8)
Stained but no reference to cargo condition	None (P28)
No examination of contents of bags	None (P-575)
No examination of contents of bags	None (P-31, P-32)
Contents of CG-762 only cargo "surveyed"	None (P-563, P-491)
No survey of cargo in barge	None (P-561, P-492)
No examination of contents of any bags	None (P-50, P-558)
No examination of contents of bags	None (P-505)

ANALYSIS OF SURVEYS WHICH SHOW LACK OF EVIDENCE TO SUPPORT FACT FINDINGS

Claim No.	Cargo	Amount Awarded	Survey Report
19	Flour	$ 11,242	662 Stained Bags
20	Flour	$168,084	9,857 Stained Bags
21	Bulgur Wheat	$181,634	21,736 Bags condition not ascertained
22	Bulgur Wheat	$182,900	6,703 Stained Bags 15,791 Bags condition not ascertained
23	Sorghum Grits	$130,812	16,829 Bags condition not ascertained
24	Sorghum Grits	$ 755	79 Water Damaged Bags
25	Bulgur Wheat	$ 20,724	215 Partially Damaged Bags 1,000 Damaged Bags

ANALYSIS OF SURVEYS WHICH SHOW LACK OF EVIDENCE TO SUPPORT FACT FINDINGS

Defect in Survey	Evidence in Support of Cargo Claim
No examination of contents of bags left on barge	None (P-504)
No examination of contents of bags left on barge	None (P-506, P-77)
No survey of cargo in barges	None (P-148, P-92, P-93, P-94, P-95, P-83, P-81)
No examination of contents of bags/ no survey of cargo	None (P-141)
cargo not examined/ final report never issued	None (P-174, P-494)
No examination of contents of bags	None (P-175)
No quantification of partial damage	Partial (P-495, P-176)

ANALYSIS OF SURVEYS WHICH SHOW LACK OF EVIDENCE TO SUPPORT FACT FINDINGS

Claim No.	Cargo	Amount Awarded	Survey Report
26	Bulgur Wheat	$ 3,326	196 Water Spoiled Bags
27	Non-Fat Dry Milk	$ 90,916	5,420 Wet Bags
28	Bulgur Wheat	$ 9,972	580 Water Damaged Bags
30	Sorghum Grits	$ 6,469.49	767 1/2 short and torn bags
31	Sorghum Grits	$ 353	42 Stained Wet Bags
42	Non-Fat Dry Milk	$233,375	13,915 Bags "said to be" stained and damaged by seawater
47	Bulgur Wheat	$ 13,948	771 Stained and torn bags
48	Vegetable Oil	$ 149	25 Damaged Pails

ANALYSIS OF SURVEYS WHICH SHOW LACK OF EVIDENCE TO SUPPORT FACT FINDINGS

Defect in Survey	Evidence in Support of Cargo Claim
No examination of contents of bags	None (P-177, P-493)
Double hearsay/no examination of contents of bags	None (P-179)
No examination of contents of bags	None (P-181)
No reflection of manifest correction notice (D-499)	Partial (P-183)
None	(P-495)
Admittedly insufficient/ no examination of contents of bags/erroneous report of amount of cargo discharged	None (P-214, P-500)
No examination of contents of bags/conflicting survey	None (P-231, P-502)
Cause of damage unreported	None (P-235)

ANALYSIS OF SURVEYS WHICH SHOW LACK OF EVIDENCE TO SUPPORT FACT FINDINGS

Claim No.	Cargo	Amount Awarded	Survey Report
50	Corn Soya Milk	$ 3,111	318 Torn Bags
51	Corn Soya Milk	$142,988	13,915 Stained and spoiled bags
53	Bulgur Wheat	$148,017	7,750 Bags "said to be a total loss"
55	Bulgur Wheat	$ 22,204	2,825 Spoiled Bags
61	Corn Soya Milk	$ 93,857	8,921 Damaged and Spoiled Bags
62	Corn Soya Milk	$ 34,064	3,213 Water Spoiled Bags
63	Flour	$124,916	16,347 Spoiled Bags
64	Bulgur Wheat	$ 95,774	867,424 pounds left in barges

ANALYSIS OF SURVEYS WHICH SHOW LACK OF EVIDENCE TO SUPPORT FACT FINDINGS

Defect in Survey	Evidence in Support of Cargo Claim
Cause of damage unreported	None (P-240)
No examination of contents of barges or bags	None (P-503, P-244)
No examination of contents of bags on barge	None (P-247, P-570)
No examination of contents of bags	None (P-520, P-253)
Double hearsay/no examination of contents of bags	None (P-273, P-275, P-517, P-512)
No examination of contents of bags/ erroneous report of amount of cargo damaged	None (P-274, P-518)
No examination of contents of bags on barges	None (P-508)
No examination of bags or contents of bags	None (P-290, P-509)

ANALYSIS OF SURVEYS WHICH SHOW LACK OF EVIDENCE TO SUPPORT FACT FINDINGS

Claim No.	Cargo	Amount Awarded	Survey Report
68	Bulgur Wheat	$ 14,177	1,750 Water Stained Bags
69	Bulgur Wheat	$208,243	15,581 Seawater Spoiled Bags
70	Bulgur Wheat	$ 42,338	5,226 Water Spoiled Bags
76	Soybean Salad Oil	$393,652	18,895 Damaged Pails

ANALYSIS OF SURVEYS WHICH SHOW LACK OF EVIDENCE TO SUPPORT FACT FINDINGS

Defect in Survey	Evidence in Support of Cargo Claim
No examination of contents of bags	None (P-560, P-292)
No examination of contents of bags/ conflicting surveys	None (P-302, P-507)
No examination of contents of bags/ conflicting surveys	None (P-305, P-521)
No examination of pails or contents of pails/ conflicting surveys	None (P-312, P-489)

EXHIBIT SUMMARY

REPORTS ESTABLISHING SEAWORTHY CONDITION OF BARGES

AMERICAN BUREAU OF SHIPPING SURVEYS AND CLASSIFICATION CERTIFICATION

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D-460-62 ??
D-464-65
D-467-469
D-471-472
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D-485
D-487-88
D-491-92
D-504-05
D-511
D-512
D-515-16
D-520-21
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D-547-48
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D-568
D-569
D-577-78
D-585-87
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D-599-600
D-606-07
D-610
D-619
D-623
D-635-36
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D-673-74
D-677
D-679
D-684-85
D-690
D-695-96
D-702-03
D-705
D-710
D-711
D-722
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D-769-70
D-777-82
D-789-90
D-804-05
D-811-12
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D-843-44
D-862-63
D-870-71
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D-914-15
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EXHIBIT SUMMARY

SEAWORTHY RECORDS OF BARGES
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D-282-84	D-536	D-628	D-718
D-297	D-537	D-629	D-727-33
D-298	D-542	D-630	D-734-35
D-300	D-543	D-631-32	D-736-38
D-301	D-550-51	D-633-34	D-749-51
D-318	D-552	D-638	D-752
D-349-51	D-553	D-639-41	D-753
D-353-54	D-555	D-642	D-757-58
D-355	D-558	D-647	D-759
D-362-63	D-567	D-650	D-760
D-364	D-580	D-651-52	D-764-65
D-365	D-581	D-665	D-775
D-368-69	D-583	D-668	D-784
D-375-76	D-588	D-669	D-786
D-377	D-589	D-670-71	D-792
D-378-80	D-590	D-672	D-793
D-405	D-596	D-675-76	D-794
D-406	D-597-98	D-678	D-799
D-407	D-601	D-680	D-800
D-409	D-608-09	D-682	D-801
D-414	D-611-12	D-687-89	D-802-03
D-432-33	D-613	D-691	D-807
D-436	D-614	D-693	D-808
D-443	D-615-16	D-694	D-809
D-444	D-617	D-700	D-810
D-481-82	D-618	D-701	D-819
D-490	D-620	D-707-08	D-820
D-506-10	D-621	D-709	D-825

EXHIBIT SUMMARY

SEAWORTHY RECORDS OF BARGES
BARGE MAINTENANCE AND REPAIR RECORDS
(cont'd)

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EXHIBIT SUMMARY

NATIONAL CARGO BUREAU
AND
UNITED STATES DEPARTMENT OF AGRICULTURE/ FEDERAL GRAIN INSPECTION SERVICES CERTIFICATION REFLECTING GOVERNMENTAL APPROVALS OF BARGES AND CARGO AT LOADING

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Proprietary to the United Press International 1985
June 19, 1985, Wednesday, AM cycle

Section: International
Length: 420 words
Headline: U.N. relief chief says relief shipments may be postponed
Dateline: Nairobi, Kenya
Keyword:
Famine
Body:

Future food shipments to drought-stricken Ethiopia may be delayed if transport problems are not solved, the chief of the U.N. relief effort in Ethiopia said Wednesday.

"If the food transport to the famine-stricken areas is not increased, then the possible remaining existing option is that food shipments not yet contracted could be delayed," Kurt Jansson, U.N. Relief Operations chief in Ethiopia, said in a telephone interview.

"We have asked the Ethiopian government and donor countries to urgently provide more trucks to increase the offtake from the ports and the distribution to the famine areas," he said.

The shortage of transport to move supplies inland to 3.9 million starving people has become a major issue for relief organizations.

Jansson said 100,000 tons of supplies are stockpiled at the Red Sea port of Assab, where most supplies enter Ethiopia.

The U.N. Food and Agricultural Organization estimates that 4.1 million of the 7.9 million famine victims in the country have received food aid since the relief effort began last December.

Last month, a rainstorm at Assab spoiled 7,000 tons of grain and other materials. With the rainy season due next month, Ethiopia needs to step up its internal distribution system to prevent more spoilage.

Relief officials estimate that one in five trucks in the country is being used in the relief effort. Thousands of tons of food have rotted in stores and warehouses awaiting distribution.

On Saturday, Ethiopian leader Mengistu Haile Mariam pledged to move an additional 35,000 tons of grain a month by diverting 300 mostly military trucks to the relief supply distribution system.

The U.N. High Commission for Refugees, meanwhile, said there is a $42.5 million shortfall in its targeted needs to provide emergency aid for 1.3 million of Africa's 3 million refugees.

In a statement released in advance of UNHCR's African Refugee Day Thursday, the organization said it has raised only $62 million of the $104.5 million it appealed for last November for emergency programs in five African countries.

The bulk of the emergency funds, $70 million, is being directed to 850,000 of Sudan's 1 million refugees. The refugees, including 730,000 Ethiopians and 120,000 Chadians, are dependent on outside help in a nation ravaged by the worst drought and famine in its history.

The UNHCR's fund raising effort is entirely dependent on voluntary contributions, with the United States, Japan and the European Community among the most generous contributors.

REFERENCE TO RECORD AND TESTIMONY

Tr. 1 at 117

Tr. II at 57

Tr. II at 60

Tr. II 63

Tr. II 62

Tr. II 69

Mitchell Dep. Vol. II at 175

Athanassopoulous - p. 73-74

Tr. III at 37

Tr. III at 40-41

Tr. III at 44

Tr. II, p. 68-69

Mitchell - p. 105-06

Ex. 179

Mitchell - 172-173, 176

Tr. III - 62-63/68-69/88/108-109/174-175

Dep. Mitchell 52, 65, 106, 162, 164-65

Dep. Athanassopoulous 11, 49-50, 68

Dep. MKR Menon - 93, 94, 98

Dep. KV Menon - 128, 134-5, 141-143, 147-148, 150, 153

Tr. III at 115

Tr. III at 7, 8

Tr. I at 117

BY MR. DUNCAN:

Q Ms. McCullough, you have testified today about a couple of bills — survey reports and I would like to ask you some general questions about those and then some specific ones as to the claims themselves. I take it that beyond what is in the report itself you have no independent knowledge as to how those surveys were performed, do you?

A Beyond what's in the report itself, no.

Q You don't have independent knowledge, do you, of the experience or skill of the particular surveyors who allegedly examined or surveyed these cargos, do you?

A No, sir.

Tr. II at 57

A Well, the surveys are performed by our surveyors in Assab, of course. I am not a surveyor, as I explained, myself....

Tr. II at 60

A Surveyors, you mean?

Q Yes.

A We have our own surveyors and then whenever we need outside surveyor we have surveyors.

Q How many permanently did you have on staff in 1985 in Assab.

A Three our own.

Tr. II at 63

Q Your surveyors, your three, would not be attending constantly at any given ship or barge?

A Well, they attend themselves.

Q Constantly, they're there the whole time?

A Not constant, no.

Q During the second half of 1985 can you give me any estimate of the average number of ships that were being unloaded daily in Assab?

A I can't give you that figure.

Q If I suggested five or six, would you disagree with that figure?

Tr. II at 62

A Yeah, well, you see, we have a qualified surveyor of our own which I call the three people. We really call them surveyor, But we call them really checkers where we appoint them in different places....

Tr. II at 69

Q Would the attending surveyor be the one that actually signed the survey report?

A Not necessarily.

Mitchell Dep. Vol II at 175-76

Q Now, in your experience, when you received a Gellatly, Hankey survey, did you place much confidence in that survey?

A. No.

Q Why not?

A They didn't have the staff to properly conduct surveys.

Q In your experience, if a Gellatly Hankey surveyor said that he attended a particular barge, would you rely on that?

A With regards to cargo damage?

Q Yes.

A No.

Q Why is that, sir?

A The — on several occasions, I know they did not attend to damaged cargo surveys. What they would do, they would ask one of the captains of the ships to do a survey and pay him for it, and they would take his report, rewrite it under their name.

Athanassopoulos - p. 73-74

Q Do you recall having problems with surveyors not attending barge surveys?

A Yes.

Tr. III at 37-51

BY MS. RAY:

Q Mr. Livermore, by whom are you employed?

A I am self employed.

Q In what occupation are you employed?

A I am a marine surveyor.

Q And could you give us a little bit of your background, sir, in the surveying, in the area of marine surveying?

A I have been in the surveying business now for ten years. Any my primary specialty is cargo although I do other marine surveying work.

Tr. III at 40-41

Q Mr. Livermore, you have seen — you have been shown a bunch of survey reports that you were told were being offered as evidence by the Government in proof of damages in this case and you reviewed those surveys?

A I did.

Q And you issued an opinion about those surveys?

A I did.

Q Mr. Livermore, generally speaking about all the surveys that you reviewed, can you please ascribe for us the inadequacies that you found in those surveys.

A I found that they lacked particulars in identification of port occurrences. They didn't explain in detail what had occurred, No. 1. The incident had occurred, the material value of the incident. It lacked — the reports lacked enough content to be convincing to me in terms of liability or responsibility for the claimed damages in terms of proof that, in fact, damages had existed and they had existed "X" a particular vessel and from a particular incident.

Q Mr. Livermore, looking at that report can you please tell us the inadequacies that you find with respect to that report in reporting any damage to cargo?

A One of the inadequacies is that there is a major conflict. I see where the report indicates that upon arrival and prior to

discharge the barges were well stowed with no apparent signs of damages. And then on the second page there is a report of 4,649 bags being water damaged due to leakage and no explanation to explain what occurred. There is an indication of the barge but there is no information when it occurred. There is information it occurred, but no information when it did occur....

Tr. III at 44

Q How would that examination be undertaken?

A Take several of the bags and open them up and look at the contents.

Q Does a wet bag on the outside necessarily mean the contents have been damaged?

A No.

Q Does a bag stained indicate that the contents would be damaged?

A No.

Q The only way to determine whether the contents have been damaged is to examine the actual contents of that package?

A Yes.

Q And should a survey reflect, too, that an examination of the contents was undertaken.

Tr. II at 68-69

Q Would it be fair to state that your company does the majority of the surveying for the relief organizations bringing cargo into Ethiopia?

A Yes.

Q Would they be your largest customer?

A Yes.

Mitchell - at 105-106

Q Who were the agents that you refer to in Assab?

A I think the proper name is Maritime Transit & Services Corporation. It's a state organization that is responsible for handling all ships calling at Ethiopian ports.

Q You say it's a state organization. Do you mean — how do you — you deal with them, does the government come in or how do you make your arrangements with them?

A They are a corporation of the government. You have no choice. You must appoint MTSC as your agent in Ethiopia.

Q You mean simply because there's nobody else there?

A They don't allow it. The government doesn't allow it.

Ex. 179

Mitchell at 172-173

A Generally, when they went aground, they went aground, fortunately, in this sandy area, although, on a couple of occasions, we did have them go on the reef, but they were not damaged to the extent that the cargo inside — in fact, I can't even recall if they went aground when they were empty or when they were loaded, but we didn't have any cargo damage due to groundings (indicating). That, I can recall.

Mitchell at 176

Q What about in the case of a barge when there would be no captain.

A For a barge survey, they would have to attend on the barge damage.

Q So in your experience, any time there was a barge survey, they were, in fact, thee?

A For barge damage, to my knowledge, yes.

Q What about cargo damage?

A They would obtain information either, as I previously stated, through a contract with a ship captain or their own surveyor or they would glean information form the agents or the owner's representative.

Q Do you know of any instance where the Port Authorities in Assab did not allow barges to be offloaded because the port was too congested?

A No.

Q Of your own personal knowledge, do you know whether or not the NGOs were aware of the port congestion?

MR JONES:

Tr. III at 62-63/68-69/88/108-109/174-175

Q Who runs the Port of Assab? You can sit back down again.

A It's run by the Government.

Q Is there a particular agency of the Government that runs the port?

A Yeah. They're call Maritime Transport Authority.

Q And who provides for stevedores in the Port of Assab?

A The Port Authority.

Q Let me rephrase that. For longshoremen?

A The Port Authority.

Q Do you have any choice in what longshoremen to use?

A No, sir.

THE WITNESS By the Government, right. They did not allow any private agencies later on. And it was only one agency for all shipping lines.

A Yes, sir. I mentioned earlier it's the Government who handles the port. No private individuals were allowed to handle any functions of the port.

Q What do you mean by "functions of the port"?

A That would be the pilotage, bring vessels in or out. Discharging of the cargo. All that was purely handled by the Port Authority.

Q Now, with regard to the Port of Massawa, that's in Ethiopia also?

A Yes, sir.

Q And who runs that port?

A Again, it's the Port Authority.

Q And in what capacity were you aboard the ship in '85 and '86?

A Both master on the STONEWALL JACKSON and chief officer on the ROBERT E. LEE.

Q Sir, as the chief officer or as master were you overseeing the discharge of LASH barges from the mother vessel into the water in the Port of Assab?

A Yes, I was.

Q And to whom did you deliver custody of the barges in the Port of Assab?

A We deal with an agency, I forget the name of it, Maritime something or whatever, which is a direct affiliate of the Government of Ethiopia.

Q And when the barges come off of the mother vessel they're given — are they given to the port tugs?

A Yes, they are.

Q And who operates those tugs?

A The Government employees or the tugboat masters or employees of the Ethiopian Government. In retrospect, I could add that they work for the Port of Assab and the Port of Assab is part of the conglomerate of the Government of Ethiopia. Everything is Government ran.

Q Is that also true in Massawa?

A Yes, it is.

Q Is it also true in Port Djibouti?

A Yes, it is.

Dep. Mitchell at 52, 65, 105-106, 164-165

At that point in time, the port was heavily congested. The tugboats, nobody had much control over the tugboats and, although you would give instructions to the agent to instruct the tugboat to tie up barges at specific buoys, there was no guarantee that they would do — that they would follow your instructions.

A As I recall, first of all, we had to get permission from the Ethiopian Ports Authority to bring in a chartered tug to operate in Ethiopian waters, which they declined at first. Then, eventually they agreed to it and, in the interim, Central Gulf had started to bring in barges at Assab, so the tug actually came on charter after Central Gulf started to

calling at Assab, and I think it was a joint charter or a joint agreement from —

A They are a corporation of the government. You have no choice. You must appoint MTSC as your agent in Ethiopia.

Q You mean simply because there's nobody else there?

A They don't allow it. The government doesn't allow it.

A Not to my recollection.

Q Mr. Mitchell, with respect to the Port of Djibouti, that is not a port that is run by the national government, is it?

A Yes, it is run by the national government of the Republic of Djibouti.

Q The port is? Are the agents there governmental agents?

Q Is there, in your experience, any priority in the discharge of vessels in the Port of Assab?

A You mean regulatory priority or —

Q As a practical matter, what the government unloads first.

A During that time, they were giving priority to their own national line and also to Soviet carriers bringing in military equipment and, then, it was conventional vessels, and LASH barges, eventually, they were using as a warehouse, giving it lowest priority out of — the main reasons, I think, being that they had no space ashore and they were using the barges as warehouses and, therefore, the cargo wasn't evident to people who came down to inspect the port. By that I mean the NGOs and United Nations representatives.

Q Now, do you consider LASH barges to be designed for long-term storage of food products?

A No.

Q Would you describe for me the port conditions in 1985 and 1986 in Assab?

A Heavily congested with cargo, a lot of vessels waiting to discharge, insufficient trucks to remove cargo from the port. Those were the basic conditions.

Q Now, in your experience, when you received a Gellatly, Hankey survey, did you place much confidence in that survey?

A No.

Q Why not?

A They didn't have the staff to properly conduct surveys.

Dep. Athanassopoulos at 11, 49-50, 68

Q A little more particularly, what was done with the lash barges after the discharge from the mother vessel at the Port of Assab in 1985 and '86?

A They were taken in custody from the port tugs, towed to the fleeting area, and secured there. And whenever we had the place available at the dock, they were towed again to the dock for being stripped of the cargo.

Q You go on to state in this memo that Central Gulf was going to try to expedite their stripping by bringing in additional equipment.

A Well, I am saying by bringing.

Q I beg your pardon?

A by bringing, yes, a mobile crane, trucks and diesel, yes, true.

Q And that that would have to be approved by the Ministry of Transport?

A Yes, sir.

Q Okay. Do you know if that was ever approved?

A I had this information from K.V. Mennon and it was not approved, of course.

Q But when you say "of course," that sounds like you expected it not to be approved.

A Well, we tried, as Waterman, to get a similar approval and we were denied.

Q Do you know why?

A The terms and conditions they were placing, the Ministry of Transport, they weren't acceptable to anybody.

Q Was there more than one agent in Assab?

A Only one.

Q Government agency, correct?
A Government agency.
Q And what was the agent's role? What were they supposed to do?

Dep. KV Menon at 93, 96, 98, 128, 134-135, 141-143, 147-148, 153

Q So the port had control over discharging or not discharging barges?
A Right.
Q And who tied up the barges to the other barges or to the buoy?
A It was the mooring gang of the port.
Q And the only gangs typing up or untying barges were government gangs?
A That's right.
Q And the only stevedores operating in the port were government stevedores?
A Right. You're right.
Q And isn't it true that there were problems at the port with respect to getting the barges emptied?
A Yes.
Q And isn't it true that those problems were a result of the fact that the government was not allowing — was giving priority, rather, to manned cargo ships?
A Yes.
Q And that the lash barges, essentially, were being used as storage warehouse?

MR. JONES: I'm going to object to the form of the question.

THE WITNESS: Well, I don't know whether stored warehouses or whether they were just left there...

...you were shown one Telex which related to the barge CG 813 as to its condition.

Q And isn't it true that not Central Gulf nor — well, let's just limit it to Central Gulf — didn't have nay choice but allow those tugs and mooring gangs to move their — to handle

their barges and bringing them in to the fleet area?

A Yes.

Q And, again, you reiterate here, as you did in your other letter, that the port-employed mooring gang was improperly securing the barges in the fleeting area. Isn't that true?

A Yes.

Q And here didn't you go so far as to say that the foreman had refused to take instructions from the Central Gulf representative on how to fleet the barges —

A Yes.

Q — and how to secure the barges?

A Yes.

Q And that they wouldn't even allow you to go over to the fleeting area to inspect the barges as fleeted to ensure that they were properly secured, would they?

A Yes.

Q They would not allow you to do that?

A Sorry?

Q They would not allow you?

A At that time, no.

Q And isn't it true that when you arrived at Assab to review the facility there,that you noted that there was a — I think you called it an acute shortage of trucks and cranes?

A When was this?

Q When you arrived in Assab the first time to review the nature of their facilities?

A There was a shortage of trucks, yes.

...included at its own expense and donated to the government, —

A Yes.

Q — but that the government refused their offer?

A Yes.

Q Could you fire those stevedores?

A No.

Q That is because they were port authority-appointed stevedores?

A That is correct.

TR III at 115

THE WITNESS: The port was absolutely overwhelmed with cargo. Cargo was absolutely stacked, I would say, as much as 40 feet in the air. I mean, they had been trying to build warehouse. The cargo just was not leaving the port area. It was absolutely incredible. It doesn't rain very much there and obviously that's what saved them, but they did have some canvas on different sections of cargo but most of it was just open air, I mean, and you would have to see it. Naturally, pictures were not allowed. But you would have to actually see it to grasp the size and the amount of relief cargo that came into that port and that was on the docks. It was just overwhelming.

Tr. III at 7.8

A Since as early as September of '85 when we discussed this yesterday we continually had a problem with the fact that the United States Government turned their back and refused to do anything —

Q Mr. Johnsen, my question was, sir —

THE COURT: Wait a minute. Let him finish.

THE WITNESS: —refused to do anything to assist us in the discharge of our cargo. This was Government cargo, Government agency and they refused to do anything to get our cargo discharged. And at the same time the Government of the United States turned their head when it was all over the front of the newspaper and TV that they bulldozed this cargo ashore when it was discharged. They refused to give us demurrage on the cargo, they did not do anything to provide berthing. We did everything in our power to try to divert cargo or to do something to assist the United States Government in discharging this cargo and they refused to do anything to help us.